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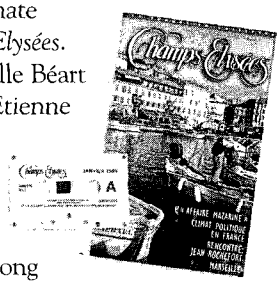

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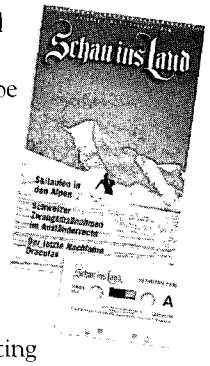

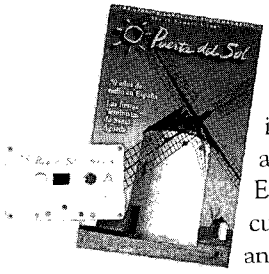

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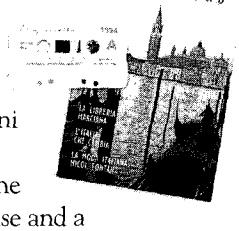

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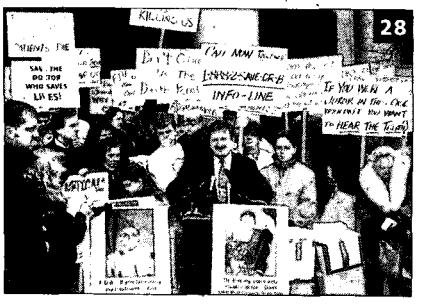

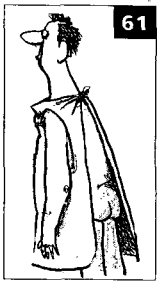

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Editorials

4 No Class by Virginia I. Postrel
Bill Clinton's education-as-entitlement programs.

8 Tragic Government by Brian Doherty
Strengthening the state to avoid the unavoidable.

Features

22 Occupational Hazards by Walter Olson
Why "sued if you do, sued if you don't" is the new rule in employment law.

28 Malignant Law Enforcement by Brian Doherty
The FDA's war against an unorthodox cancer doctor.

35 The Incredible Shrinking State by William D. Eggers
How New Zealand got up from down under its bureaucracy.

Columns

44 The Screening of America by Brian J. Taylor
Crime, cops, and cameras.

47 Pot of Trouble by Adam J. Smith
Medical marijuana: a tale of two states.

49 Road Hogs by Ed Carson
Will Congress cut back the transit pork?

52 The Twin Paradox by Ronald Bailey
What is wrong with cloning human beings?

Books

55 Land Stakes by Rick Henderson
Property Matters: How Property Rights Are Under Assault—And Why You Should Care, *by James V. DeLong*
This Land Is Our Land: How to End the War on Private Property, *by Congressman Richard Pombo and Joseph Farah*

58 Of Sand and Cities by Steven Postrel
How Nature Works: The Science of Self-Organized Criticality, *by Per Bak*
The Self-Organizing Economy, *by Paul Krugman*

61 Taxing Our Health by Michael W. Lynch
Market Driven Health Care: Who Wins, Who Loses in the Transformation of America's Largest Service Industry, *by Regina Herzlinger*

63 Peace Corpse by Nick Gillespie
Making Peace with the 60s, *by David Burner*

Departments

10 Letters
Confusing price index; thugs, not drugs; school days.

14 Citings
Smuggler's boobs, defining democracy, cannibis catch-22, Trump change...
- *Sources: Data vs. Paul Ehrlich,* The New Republic, *and DARE*
- *Soundbite: Actor Michael Moriarty*
- *Artifact: The science of the lambs*
- *Brickbats: Flashing drug dealers, erotic air space, Clinton's geography...*

66 Selected Skirmishes: Deficit Attention Disorder by Thomas W. Hazlett
The case for the Balanced Budget Amendment.

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No Class

Bill Clinton's education-as-entitlement programs threaten to reverse positive trends in higher education.

By Virginia I. Postrel

It's not surprising that Bill Clinton has decided to become the education president. Southern governors always emphasize education, hoping to drag their states up a few economic notches and prove they're on the side of civilization; hence, the South has produced such secretaries of education as former Tennessee Gov. Lamar Alexander and former South Carolina Gov. Dick Riley. Clinton follows in this tradition, hailing from a state in which a mere 13.4 percent of the population had college degrees or better as of 1990 (an even worse showing than Mississippi). He knows education is important because he grew up in and later governed a place where it was relatively rare.

Now he wants to make two years of college an entitlement and turn tuition into a tax shelter. He demands a "new nonpartisan commitment to education" and declares that "education is a critical national security issue for our future, and politics must stop at the schoolhouse door." That declaration is, of course, backed by piles of polls showing that education handouts are popular among voters in general and women in particular. And it's tied to programs designed to make educational entitlements as much a part of middle-class life as Social Security or the home mortgage deduction.

In a moment of ideological frankness, Assistant Secretary of Education David Longanecker blurted out this allegedly nonpolitical policy's goal: bribing Generation X and its successors to back big government. "We want to make a very strong statement," Longanecker said following the State of the Union Address, "that it is worth it to this country to invest in these middle-class students. We believe it will help them re-engage in civic life and make them believe that government does something for them too."

Maybe politics should stop at the schoolhouse door, but intelligent analysis shouldn't. Clinton's higher-education policies are harebrained and irresponsible, obviously concocted by people who care more about poll results than about what they might be doing to the nation's colleges or their students. They ignore the basic, well-understood dynamics of higher-education finance and evince no knowledge of how colleges actually work or what challenges they face.

Over the past year or two, American colleges have begun to address two linked problems: rapidly rising tuitions and rampant grade inflation. Clinton's plans threaten these promising trends.

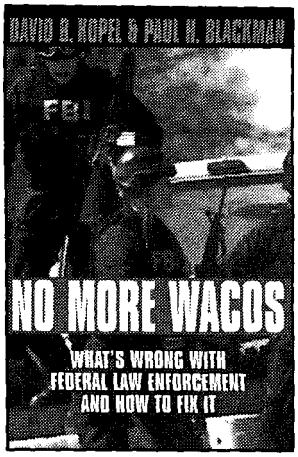
College tuitions rose rapidly in the 1980s—2.7 percent annually for state schools and 3.9 percent for private schools, *after* accounting for both inflation and expanded financial aid. That increase had many causes, but the most important was simple supply and demand: Supply was essentially fixed, and demand was rising rapidly. Students were willing to pay, for good reason. In crass financial terms, a college degree is an excellent investment, with an average return of around 13 percent a year after inflation.

"In almost any other unregulated market, an increase in demand against a fixed supply is sure to push up the equilibrium price," writes economist Charles Clotfelter in *Buying the Best*, a 1996 study of higher-education finances that focuses on four elite schools. "It is a distinctive feature of the market for higher eduction, however, that the supplying firms made it a practice *not* to charge what the market might bear, choosing instead to ration demand by electing talented and diverse student bodies who would best fit their institutional objectives. At the same time, however, the trustees and administrators of these favored institutions could not fail to observe that their admissions offices were being besieged by eager applicants, and that an unusually large tuition increase would not cool the ardor of prospective students." At all but a few elite and well-endowed schools, in fact, prices were what the market would bear—and it could bear a lot.

At some point, however, parents simply don't have the cash—you can't take out a mortgage against your kid's future earnings. And families paying full freight have started to balk at the price discrimination that charges them high prices and subsidizes scholarship students. Those shocking list prices can be misleading: A University of Chicago official notes that the average student there pays only about half of that private school's approximately $22,000 list price. But family income is at least comparable at the public University of Illinois, where tuition is under $3,000 a year. Families that make too much money to qualify for financial aid find it hard to justify full fare at a private college.

And not every expensive private school offers a world-class, Chicago-style education. These run-of-the-mill colleges are feeling competitive pressures. Susan Lee and Daniel Roth of *Forbes* have documented how numerous private colleges that compete with nearby state schools have cut tuition to compete. Most are small, non-elite regional schools such as North Carolina Wesleyan, which slashed tuition by 23 percent. And some more-selective colleges are getting price-conscious: Rice University is limiting increases to inflation, while Lehigh University is aiming for that goal. Even Bennington College, long the most expensive school in the country, has frozen its tuition.

So tuition increases are finally decelerating. "Although there is no evidence that the University is losing a significant number of students because of the cost of a Princeton education,...large tuition increases in the face of the growing public concern about the overall cost of higher education would be contrary to the long term interests of the University," declared that school's budget-setting Priorities



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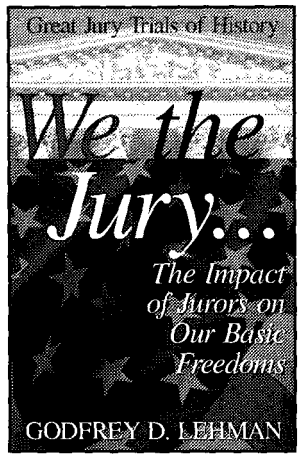

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Committee, recommending a 4.9 percent increase in tuition and fees for 1996–97—not exactly modest, but the smallest jump in two decades.

Into this evolving situation blusters Bill Clinton, trying to buy students' love. His plan is twofold: First, he calls for making "the 13th and 14th years of education—at least two years of college—just as universal in America by the 21st century as a high school education is today." To do that, he would provide a $1,500-a-year tax credit for tuition, as long as the student maintains a B average. Second, he proposes a $10,000 tax deduction for any post–high-school tuition.

The immediate effect of both plans would be to push up tuition. As David Henderson notes in *Fortune*, the average tuition at community colleges was only $1,114 in 1994. Clinton's dollar-for-dollar tuition credit "would make college students paying less than $1,500 in tuition unconcerned about increases" because the federal government, not the student's family, would be footing the bill. In other words, the average community college tuition could rise to $2,614 before the *effective* cost rose at all. Pressures to keep costs down would be severely reduced. (Since most community college students work and go to school only part-time, there's even more room for unnoticed increases than these figures suggest.) Those painless price hikes would not only give schools an incentive to increase overheads but also make the tax credit all but impossible to remove, lest large numbers of people be priced out of the market.

But the tax deduction is almost as bad. It lowers the cost of tuition by the tax rate—say, 28 percent—so that the first $10,000 of tuition actually costs only $7,200. That means those schools can go right back to jacking up tuitions. They'll still feel competitive pressure, but only after they've raised their prices to the post-bribe equivalent of today's levels. Again, the critical fact is that *the supply of higher education is more or less fixed.* Increasing demand simply drives up prices.

But what's truly worrisome about Clinton's education plan lies in his belief that two years of college should be a universal entitlement—as common as high school and just as meaningless. Already, community colleges give far too many students the education they should have gotten in earlier years. (Nor is this role unique to nonselective two-year schools. California State University branches, which accept students in the top 25 percent of their high school classes, devote enormous resources to remedial education.) By requiring a modest entry fee and maintaining the special aura of higher education, community colleges screen out the people who don't want to be in school. Many will accept anyone with a high school diploma or its equivalent; selection is based not on the student's academic record but on his or her willingness to work. As a result, students actually have a chance to learn. Their teachers do not have to worry about maintaining basic discipline or giving assignments no one will complete.

Making community colleges an extension of high school would destroy their role as places that let low-income or average students enter the world of serious education. And conditioning tax credits on a B average would go even further: It would make grade inflation mandatory in all freshman and sophomore classes—and not just at community colleges. Over time, every grade below a B would disappear.

Even the purely economic parts of Clinton's plans could push grades up. There appears to be a connection between rising tuitions and rising grades.

Although less selective institutions still try to weed students out, grade inflation has become a major problem at elite universities. The Vietnam-era inflation is well known; professors who feared casting students out into the draft boosted grades in the late 1960s and early '70s. What is less heralded is the enormous jump elite-college grades have taken since the mid-'80s, the very period during which both the cost and the value of a college degree have escalated rapidly. During my years at Princeton, from 1978 to 1982, about 30 percent of grades were A's of various sorts, a level the school had maintained since a huge jump in the early '70s. Today, however, that figure stands at 45 percent. The pattern is repeated at similar schools.

"The language of grading is utterly debased," comparative literature professor Clarence Brown told the *Princeton Alumni Weekly.*" The chairman of the math de-

partment noted that when a professor gave C's to a third of the students in his linear algebra class—a common distribution only a decade before—he got a "long letter" from a dean complaining that such grading would discourage students.

No one knows exactly what happened to push grades up. Princeton Registrar Anthony Broh attributes the jump to pressure from students competing for graduate and professional school slots. But entering college students are also more likely to be accustomed to pumped-up grades; since the mid-'80s, the high school grades of college freshmen have skyrocketed, even though more students are going to college. It's not surprising, then, that they expect—and sometimes demand—to do equally well in college. As tuitions go up, students demand "more" for their money. Since most students are not budding intellectuals but pragmatic pre-professionals, "more" means a handsome transcript, rather than the knowledge it might represent. If you are paying $25,000 a year, you do not expect to be handed bad grades.

But there are signs that universities are worried about meaningless grades. Stanford, famous even in my college years as the school with no B's, has restored the F. Dartmouth has begun reporting not just grades but the course median and number of students. Princeton is considering a similar approach. Brown, the comp. lit. professor, rejoices that 35 Princeton students—including one who flunked his class—weren't able to graduate last year because of academic failure. "It is a great solace to know that an institution's backbone is on the mend," he writes.

And, once again, Clinton's tax credits for B's and education-as-an-entitlement philosophy can only do damage. Increasing the demand for higher education and pushing up the price will only heighten students' sense that they deserve high grades just for getting into an expensive, elite school. In fact, Clinton promises to spread that baleful attitude down to the lowliest community college, until every student in America feels he or she deserves a diploma and an A-studded transcript just for showing up. That is hardly the way "to prepare our people for the bold new world of the 21st century." We can only hope that the professor-filled GOP leadership will develop the backbone to say so.

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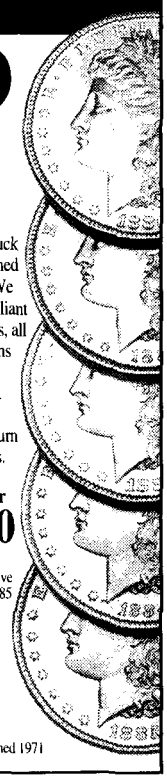

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Tragic Government

Strengthening the state to avoid the unavoidable

By Brian Doherty

Sometimes a tragedy can be the state's best friend. People don't like to believe in unavoidable atrocities, don't like to accept that deeply regrettable events can and will happen because the universe—or someone in it—is unpredictable, imperfect, and unmanageable. We crave control. Vain attempts to manage the unmanageable at any cost are the strongest impetus turning citizens into supplicants, begging for a government solution to every potential problem.

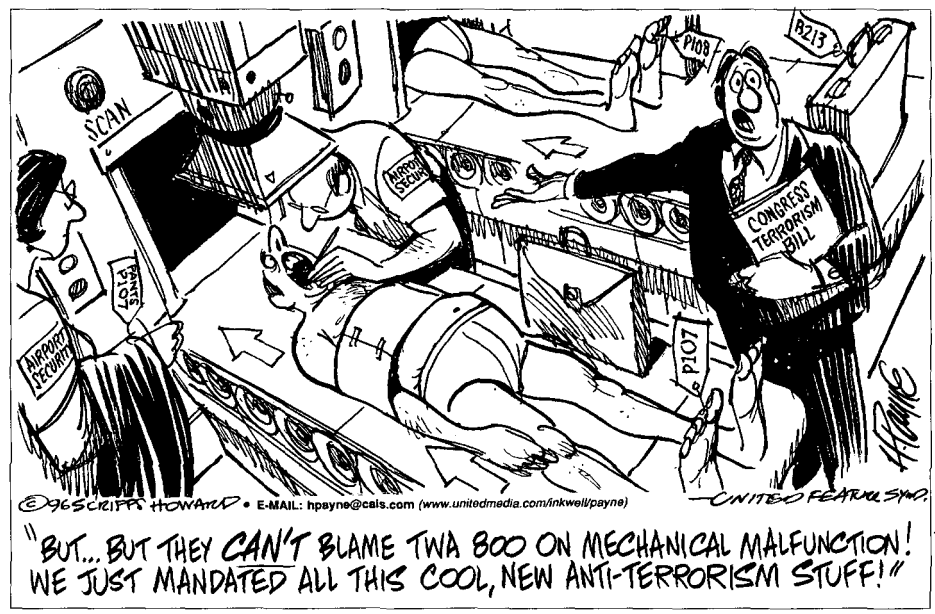
The Empire State Building shooting spree of Palestinian immigrant Ali Abu Kamal is almost too good to be true for two coalitions set on restricting freedoms: anti-gun and anti-immigration forces. An *immigrant* killing people with a *gun* draws forth the predictable suggestion that if people weren't free to take the perfectly innocent actions that contributed to the tragedy's occurrence—in this case, immigrate and own a gun—then we could ensure such tragedies never happen again.

Any sinister deed by an immigrant becomes a weapon in the hands of anti-immigration warriors. Arch foe of immigration Peter Brimelow, who writes for *National Review* and *Forbes*, made much hay from our last well-publicized shooting spree by an immigrant, former Jamaican Colin Ferguson. For every Albert Einstein, Brimelow implied in his anti-immigrant book *Alien Nation*, immigration gives us both a Sacco *and* a Vanzetti.

Republican members of Congress—coincidentally?—used the day after Kamal's crime to excoriate the Clinton administration for allowing 180,000 immigrants to become citizens without adequate criminal record checks. On the front page of *The New York Times*, the story of this assault on Clinton's Immigration and Naturalization Service ran next to the story about Kamal's background. Of course, even the most stringent background check would have done no good in the case of high-profile immigrant criminal Kamal: His previous life in Gaza was by all accounts a quiet one of teaching English and translating.

Others, meanwhile, led by New York's Republican Mayor Rudy Giuliani, were quick to blame not lax immigration policies but the lax gun laws of Florida, where Kamal bought the gun he used to commit his mayhem. Kamal did go through the Brady Act shuffle of waiting five days, showing a Florida ID, and undergoing a criminal background check (which he passed).

But Florida didn't have access to any



HENRY PAYNE

national database that could show another way in which Kamal was forbidden to own a gun—a 1994 law barring foreigners with fewer than 90 days' residency from buying a firearm. That failure provides more rhetorical firepower for Bureau of Alcohol, Tobacco, and Firearms agents and their ideological allies to argue for more, and more efficient, national systems to track every detail of everyone's lives—to prevent, of course, such tragedies as Kamal's murderous rampage.

As an unnamed "senior official" with the BATF told *The New York Times*, "The whole system broke down" in allowing Kamal access to a weapon. We are fortunate, in a way, that Kamal *had* violated a law. Now all that gun law mavens can call for is more efficient enforcement of existing laws, instead of even more sweeping gun prohibitions. After all, previously law-abiding people who were born here could be equally prone to fatal outbursts of violence—and often are.

It's never more important to move slowly and carefully before granting the state new powers than in the wake of tragedies. As they show their papers to airline check-in counter employees, how many people remember that the "terrorist attack" that supposedly justified these new, extra-stringent—and still secret—security measures seems most likely to have been just mechanical failure? (See "Gonna Fly Now?," Citings, March.) After new government encroachments claim their ground, the alleged reason for them is quickly forgotten. But the encroachments remain.

Any attempt to ensure that Kamal's heinous act can never be repeated will haunt us long after the memory of Kamal is gone. More stringent laws to keep out the likes of Kamal because of what he *might* do violate both human freedom of movement and our traditional national character; like many things in life, immigrants bring dynamic and unpredictable benefits along with the occasional risk.

A better national database to make sure newcomers like Kamal can't buy guns means an end to privacy for all of us. It also means a convenient federal record of who does and doesn't have guns. Such a list would be very useful if further, more stringent, restrictions on gun ownership—or gun owners—are contemplated the next time someone misuses a gun in a flamboyant and tragic way.

More laws can't make us safe from the tragedies that are the inevitable result of freedom, and of living around other people. Life is real, life is uncertain, life is inevitably unsafe. Measures to make it safe at all costs come with dangers of their own. ◆

REASON News

■ Congratulations to Staff Reporter Ed Carson, who won first-place honors in the Institute for Humane Studies' Felix Morley journalism contest. The contest recognizes young journalists writing in the classical liberal tradition. After almost three years on REASON's staff, Ed now departs for *Investor's Business Daily*, where he will be covering entrepreneurial businesses for the New America page.

■ *Reason Online* continues to expand and improve. Recent additions include cover stories and editorials from 1994 (with more 1994 content added monthly), Chuck Freund's satirical looks at Clintonics and a "Clinton 101" curriculum, numerous links added within articles, and several navigation aids. Coming soon: the Charles Murray speech that inspired *What It Means to Be a Libertarian* and Virginia Postrel's talk at the same event (REASON's 25th anniversary banquet). Visitors can see what's new by checking "new additions" or get a site tour with the "Web Site Table of Contents." And you have a 1-in-10 chance of winning a free copy of *Free Minds & Free Markets* if you fill out our survey. Check us out at www.reasonmag.com—and spread the word.

■ "I almost fell out of my seat and started cheering," writes one of our subscribers: Yes, that was a REASON T-shirt you saw comedian Drew Carey wearing on his highly rated sitcom in early March. He's a long-time REASON subscriber and bought it at an Evening with the Editors in Los Angeles. These are cocktail parties open to all subscribers for a nominal donation. So far we've held them regularly in L.A. and Washington, as well as once in Chicago. If you'd be interested in sponsoring one in your area, contact Jennifer George at our L.A. office or via e-mail to RFDevelop@aol.com.

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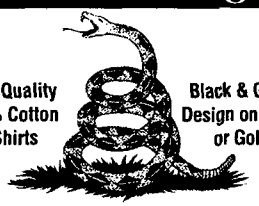

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"The twentieth-century statesman whom the Thomas Jefferson of 1793 would have admired most is Pol Pot."

So wrote Conor Cruise O'Brien in *The Atlantic Monthly*, and Forrest McDonald quotes him approvingly in *National Review*. *Washington Times* columnist Richard Grenier recently compared Jefferson to Heinrich Himmler—unfavorably.

Why are they saying these things? What are the facts? Get the April issue of the *IOS Journal* and read

"Jefferson's Forgotten Philosophy"
by David N. Mayer
Author of *The Constitutional Thought of Thomas Jefferson*

And in the same issue:

"David and Leviathan"
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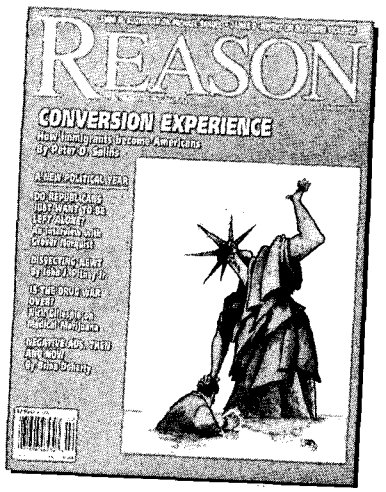

Confusing Price Index

Virginia Postrel ("Priced to Move," February) makes a good case against the consumer price index but omits the obvious conclusions: Ditch the CPI and close the Bureau of Labor Statistics. Like most government agencies, the BLS is not just wasted money: It is a public-choice headache. A wise governor of Hong Kong blocked official collection of economic statistics lest he be pressured to do something about them. We can learn from him.

Roberto Alazar
Irvine, CA

Normally I reconsider my position whenever I disagree with Virginia Postrel on the subject of libertarianism. On the subject of the consumer price index, reconsidering my position is not working. I suspect that the purpose of the CPI was never to make everybody feel good by showing how technology can improve the quality of life. If it's to make any sense, the CPI market basket must be confined to items fundamental to living that have not changed. If an item has changed, we should be on guard both for indications that the quality of life has fallen and for effects of technology that must be discounted.

For example, choosing to rent a movie on videotape because theater crowds have become rowdy and the car is no longer safe in the parking lot suggests that we're worse off, as you may have meant to imply. Being able to buy a movie and watch it at any time, a luxury unavailable to kings centuries ago, is a benefit of technology and has nothing to do with prices. Substituting a phony synthetic breakfast drink for fresh orange juice may reduce the quality of life, while a lower price for fresh oranges may represent only a benefit from better transportation technology.

Government propaganda is certainly not likely to provide insight; their suggestion that people will cheerfully buy less-desirable foods and from a discount store reveals only their effrontery.

William J. Roberts
74040.625@compuserve.com

The thrust of Virginia Postrel's February editorial, "Priced to Move," and of your December 1995 article "The Good Old Days Are Now" is that we are all better off than we were 10 years ago.

Are we? Ten years ago I lived in a large modern house on a large lot in a nice neighborhood. Today I live in a small old house on a tiny lot in an old neighborhood. What does it avail me that new cars are better than 10 years ago? I drive a 12-year-old car and see no prospect that I will ever again be able to buy a new car. I do not have air conditioning or a VCR or a cell phone. My TV is dying, and when it goes, I will not replace it. I cannot afford restaurants or movies, much less an airline ticket to anywhere. I do have a computer, this being a necessity for writing résumés and cover letters, having been laid off for the second time in five years. This is my reward for having invested years of hard work earning a Ph.D. in engineering.

I suggest that REASON's readers would be better served if you stopped printing these pieces by rich people who only talk to other rich people and get a writer who actually has some contact with common people.

James W. Austin
Bellevue, NE

Virginia Postrel replies: Mr. Alazar and Mr. Roberts both point to fundamental problems in computing a cost-of-living index—the temptation to political shenanigans and the difficulty of comparing today's apples with yesterday's oranges. Although Mr. Alazar's prescription that the government collect no economic data might have some positive effects in such areas as trade statistics, where the existence of the statistics creates the issue, I'm quite sure that private researchers in both academia and business would still be interested in the questions the CPI attempts to answer. Indeed, far from being easily dismissed "government propaganda," the Boskin report represents a consensus of privately employed economists who have worked in this area over decades when lawmakers had no particular interest in the subject. They will continue to research and publish regardless of whether any legal changes are forthcoming, because they are interested in fundamental questions about the relations between prices and living standards.

In this regard, some of the most interesting and provocative work has been done by economist Robert J. Gordon of Northwestern University using not government data but a century of Sears catalogs. Gordon's work suggests quite convincingly that living standards have risen dramatically. If given, say, $1,000 to spend *at list price* on goods from the Sears catalog, most people would choose to spend only the first few hundred on standard, unimproved goods even when offered old-fashioned prices. The rest they would spend on today's goods at today's prices.

Mr. Austin's letter represents a common fallacy. He not only generalizes a nationwide trend from a single data point—his own experience—but also confuses economic *turbulence* with declining *living standards.* No one, least of all me, claims

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that the economy is calm and stagnant. The changes that produce progress also create disruptions, as once-dominant businesses fade and once-valued skills become less so while other businesses and skills rise. That means trouble even for some well-credentialed people, especially if they live in areas like Nebraska where the population is rapidly draining away. But Mr. Austin is hardly the first engineer ever to lose a job—my own father and father-in-law both had that experience back in the good old 1970s—nor is he the first Ph.D. to find that the market values things other than how many years one spent in school. (All investments have risks, and I have the "upside-down" home mortgage to prove it.) Finally, as someone who drives an 11-year-old car, I'm very glad it was made in 1986, not 1976; quality standards improved dramatically.

Thugs, Not Drugs

Nick Gillespie gives a balanced and well-reasoned analysis of Arizona's Drug Medicalization, Prevention, and Control Act of 1996 (Prop. 200) in "Prescription: Drugs" (February). The reaction of the feds since the initiative's passage has raised the potential significance of Prop. 200 to a higher level. By insisting on FDA approval for medical marijuana, for example, the feds remind citizens of how the FDA so often is in the way of getting helpful drugs to patients in dire need.

Readers of REASON are well aware of the FDA's responsibility for the avoidable deaths of millions of Americans. By attempting to nullify the change in treatment of nonviolent simple drug possessors (probation for the first two offenses) and the release from prison of simple drug possessors now serving time, both made possible by Prop. 200, the feds knew they would violate the 10th Amendment, recently rediscovered by the Supreme Court in the *Lopez* decision. So they switched tactics. They now threaten to pull doctors' narcotics licenses for handing a prescription (simply a written medical opinion) to a patient, which, pursuant to the law, would serve as a legal defense in the event that the patient is arrested for possessing marijuana.

In providing the patient with a prescription, a doctor is not giving or selling him marijuana, or even telling him where to get it. He is simply rendering a professional opinion regarding the drug's efficacy and applicability in that given clinical situation. This is an exercise of his right to free expression as guaranteed by the First Amendment. Thus, in order to avoid a 10th Amendment violation, the feds are now swerving into a First Amendment violation.

Prop. 200 is no longer just about drug policy reform. The federal response has raised questions about regulatory reform, states' rights, and the relationship between the people and the state. The behavior of the feds has provided Arizonans and all Americans with a concrete demonstration that the federal government is no longer the servant of the people, the protector of their liberty. Rather, it has become their master.

Jeffrey A. Singer, M.D.
Medical Spokesman
Arizonans for Drug Policy Reform
Phoenix, AZ

School Days

Regarding Rick Henderson's article on school choice, "Schools of Thought" (January): Libertarians who argue for vouchers because private schools cost less than public schools should know better. Of course private schools cost less now, but just wait until they've been funded with tax dollars for a while.

If vouchers prevail, private schools will suddenly have an interest in increased education spending. School administrators will hike tuitions, knowing that politicians will—"for the children"—increase the size of vouchers. Those who object will be political pariahs. We've been down this road before with Pell Grants and student loans, both of which contributed to massive tuition increases. Should limited-government advocates really seek new constituencies for government spending?

It's also surprising that Henderson doesn't more fully explore church-state objections to vouchers. Parents with vouchers will decide which religious teachings other taxpayers must finance. (Parents aren't the only taxpayers.) Mormons will be forced to finance the teaching that Joseph Smith was not a prophet. Jews will be compelled to support schools associated with the Nation of Islam. Evangelicals will have to finance the teaching of papal authority. This may seem trivial to many, but some of us take religion seriously. If this is trivial, then so is the issue of workers being coerced by unions into supporting political speech.

Voucher proponents usually respond that government programs already support religious education (G.I. Bill, Pell Grants), or allow recipients to spend other people's money on religion (Social Security, welfare). But isn't it a little bizarre for libertarians to justify coercion by citing programs that they don't think should exist?

Timothy Lamer
Falls Church, VA

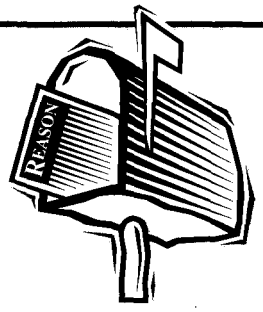
Rick Henderson claims that Milton Friedman invented the idea of education vouchers. Certainly it was he who introduced that expression as the label for a policy proposal which he has done so much to popularize. But the policy itself seems to have been advocated first by Tom Paine in his 1791 publication *The Rights of Man.*

Arguing that "a Nation under a well-regulated government should permit none to remain uninstructed," Paine urged the payment "to every poor family ...of four pounds a year for every child under fourteen years; enjoining the parents of such children to send them to school, to learn reading, writing, and common arithmetic."

Paine also straightaway provided an example to all subsequent proposers of costly reforms by proceeding to work out what taxes would be needed to finance this proposal and to indicate administrative means of insuring that his education allowances would in fact be spent, as intended, on elementary schooling.

Professor Antony Flew
Reading, England

Rick Henderson's comprehensive article on school choice unfortunately gives a misleading impression of my attitude to-



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ward low-income voucher programs and the activities of the Institute for Justice in defending them against challenges in court.

I do believe that a universal plan should be our goal. At the same time, I have consistently supported many programs, such as the Milwaukee and Cleveland plans and the CEO private voucher plans, that provide some parents with a wider choice and their children with an opportunity to benefit from better schooling. However, unless the means-tested plans prove to be steppingstones toward universal choice, I believe the end result would be to stymie effective reform of our educational system.

I commend the Institute for Justice for its dedication to promoting economic freedom not only in this area but in others and for their effectiveness in doing so.

As Henderson reports, my wife and I have set up a foundation to promote universal school choice. However, that foundation is located in Indianapolis and is being run by its president, Gordon St. Angelo, and his staff, not by us.

Milton Friedman
Senior Research Fellow
Hoover Institution
Stanford, CA

Rick Henderson provides fresh insights into the battle over school vouchers. He errs seriously, however, in describing the Institute for Justice and Milton Friedman as representing "poles of the debate" between universal and means-tested vouchers.

I.J.'s mission is to promote and defend educational freedom, and the entire movement owes an enduring debt to Dr. Friedman for pioneering the most effective means to do so. Our goal is to create legal precedents that recognize parental autonomy, and we defend against legal challenge school choice programs, whatever their contours. The Milwaukee and Cleveland programs are means-tested, while the Vermont program for students in rural school districts is universal. As we succeed, school choice programs of all varieties will blossom.

As for the "separationists," the goals are laudable but the tactics counterproductive. The real debate today is between defenders of the status quo and champions of school choice. When separationists gratuitously trash vouchers, they aid and abet the public school monopoly, creating a division among advocates of educational freedom that the National Education Association gleefully exploits. If we lose the battle over parental sovereignty, how can we expect to win the far more difficult battle over separation of school and state?

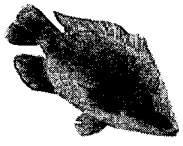
Clint Bolick
Chip Mellor
Institute for Justice
Washington, DC

Rick Henderson replies: One section of my article addressed the public-choice objections to vouchers that Mr. Lamer cites. I pointed out, for instance, that unions and education bureaucrats would be tempted to impose new regulations on voucher-accepting schools and that many separationists worry that parents may perceive vouchers as a new welfare entitlement. Yet I said that countervailing forces—including the resilient network of parents who already educate their children in religious institutions or at home—could restrain overreaching regulators.

But Mr. Lamer is not objecting to tuition vouchers so much as he is to tax-funded schooling of any kind. As I wrote, taxes have supported elementary and secondary schools in this country since before the Constitution was ratified. Those of us who would like to see the state's role in education limited, if not eliminated, should acknowledge the political obstacles that face anyone who opposes a tradition perhaps more American than apple pie.

I thank Professor Flew for pointing out that liberty lovers appear to owe yet another debt to Tom Paine.

A careful reading of the letters from Professor Friedman and Messrs. Mellor and Bolick merely underscores what I said in the story: The Friedmans and the Institute for Justice aren't at war with one another; they just believe in different paths to a similar goal. Milton Friedman will support tax-funded vouchers only if they will result in a universal program. I.J. defends all school choice proposals, "whatever their contours."



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A Pound of Flesh?

By Ed Carson

Many Americans feel that paying taxes costs an arm and a leg. Now the federal government is asking for a little more—hearts, livers, and other assorted organs. The Internal Revenue Service is sending 70 million households organ donor cards along with their tax returns.

The feds hope to increase the supply of donated organs, which falls well below the demand. (See "Hey Buddy, Can You Spare a Liver?," Citings, February.) Nearly 4,000 Americans died in 1996 while on a waiting list for a transplant. About 50,000 are on waiting lists. The federal government prohibits any compensation to organ donors.

Smuggler's Boobs

By Nick Gillespie

On February 3, Houston-based U.S. District Court Judge David Hittner threw the book at convicted smuggler Delano R. Martin. Although the federal sentencing guidelines called for somewhere between 12 and 18 months, Hittner went above and beyond in punishing the criminal.

"A sentence of 24 months should have a deterrent effect on the defendant and others unscrupulous enough to circumvent regulations intended to protect society, all for the sake of profit," declared the judge, who also tacked on a $10,000 fine. Martin owes the Internal Revenue Service an additional $38,000 for income tax evasion.

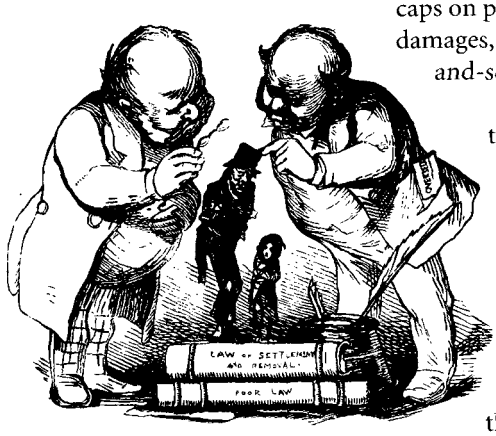
Martin's crime? Smuggling French-manufactured silicone-gel breast implants into the United States. Trade in silicone breast implants has been illegal since 1992, when the Food and Drug Administration, in a controversial decision, declared the medical devices a health hazard. (See "A Confederacy of Boobs," October 1995.) According to the government, Martin illegally imported 47 implants in 1995 and has distributed close to 600 implants to doctors throughout the country.

Customs officials told the *Houston Chronicle* that the implants have become "a major commodity" on the black market, fetching more than $1,800 a pair.

First, Expose All the Lawyers

By Ed Carson

The American Bar Association recently generated a lot of press when it declared its opposition to the death penalty. The media coverage suggested that this was an extraordinary decision for the nation's largest lawyers' organization to take. But as many critics point out—and the mainstream media did not—it is not unusual for the ABA to take decidedly left-of-center positions on controversial issues. They include:



■ Tort reform. The ABA opposes virtually all legal reform measures—loser pays, caps on product liability damages, eliminating joint-and-several liability.

■ Affirmative action. It endorses "legal remedies and voluntary actions that take into account...race, national origin, or gender."

■ Gun control. The ABA supported the "assault weapons" ban and generally endorses gun control measures.

■ Abortion. The group lobbied the last Congress in favor of continued federal funding of abortions.

■ Universal health care. It supports "universal coverage for all through a common public or public/private mechanism through which all contribute."

The ABA also backs the Family and Medical Leave Act, funding the National Endowment for the Arts, and increasing spending on child care. The organization also advises the U.S. Senate in the judicial selection process. Critics charge that the ABA is

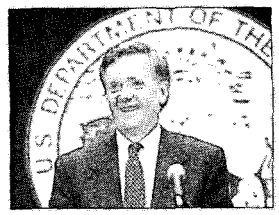
Balance Sheet

By Rick Henderson

ASSETS

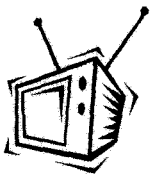
△ ▲ **Contract Job.** Last year's welfare reform lets states easily contract management of welfare programs—a $30 billion business—to nonprofits or profit-making companies. Thirty states may start contracting this year, saving taxpayers as much as 40 percent. Govs. Pete Wilson (R-Calif.) and Tommy Thompson (R-Wisc.) already let counties choose private administrators. Texas is taking bids for its entire system. Private welfare managers now include Goodwill Industries, the United Way, Lockheed Martin, and IBM.

△ ▲ **Growth Controls.** Reversing a century-old Progressive era policy, Interior Secretary Bruce Babbitt says the federal government will use "controlled" fires to help thin forests on public lands. Starting and managing fires on overgrown areas can prevent wildfires that often threaten populated areas. While greens and timber companies praise the change, foresters wonder why they must burn lumber rather than cut it.



△ ▲ **Fed Up.** By a margin of 60 percent to 30 percent, respondents to a national Lake Research poll conducted for the Lindesmith Center say doctors should be able to prescribe marijuana for seriously ill or terminal patients. And a larger proportion (68 percent to 24 percent) believes that, in states where medicinal pot is legal, the federal government should leave doctors who prescribe it alone.

△ ▲ **Minor Key.** The Supreme Court deals government minority set-asides another blow. By a 6–3 margin, the Court rejects a Philadelphia law guaranteeing 25 percent of its public-works spending to businesses owned by blacks or women. Writing for the majority, Justice Sandra Day O'Connor says any such set-asides are "highly suspect" and should be presumed unconstitutional.



▼ Tube Boobs. NBC airs *Schindler's List,* uncensored but with a TV-M rating, deeming it inappropriate for children younger than 17. A record audience watches. In response, Rep. Tom Coburn (R-Okla.) denounces the airing, saying it "should outrage parents and decent-minded individuals everywhere" and "simply should never have been allowed on public television." He later apologizes for any Holocaust-related offense but joins Rep. Ed Markey (D-Mass.) and Sen. Fritz Hollings (D-S.C.) to introduce a bill that would make the FCC establish "violence" ratings for network broadcasts and specify "safe harbor" times in which shows the networks refuse to rate must air.

▼ Tax Trick. Among the "deficit reduction" measures in the Clinton budget are new taxes that Congress would never approve. Case in point: The White House assumes $92 million in revenue from new "user fees" assessed on medical device and food makers by the Food and Drug Administration. The FDA claims such fees would speed approval of new products. Companies say the agency's bureaucracy, rather than a lack of money, causes bottlenecks. The Medical Device Manufacturers Association calls user fees "a tax on innovation."

▼ Spin City. *The Wall Street Journal,* the *Chicago Tribune,* and *The Washington Times* unearth Internal Revenue Service plans to aggressively audit nonprofit groups that criticize Clinton administration policies. Asked about the audits, White House spinmeister Mike McCurry snaps that he's "not aware of any credible news organization that's reported anything like that."

▼ Western Sting. Claiming that speed-related Interstate fatalities have doubled over the past year, Montana's governor, attorney general, and state police campaign for a daytime speed limit. In fact, notes the National Motorists Association, fatal accidents, Interstate fatalities, and total fatalities have fallen in Big Sky country since it set "reasonable and prudent" daylight speed limits two years ago.

LIABILITIES

strongly biased against conservative nominees, most famously when several members of the selection committee declared Judge Robert Bork "not qualified" for the Supreme Court, despite his standing as an eminent legal scholar.

That special role may be coming to an end. Senate Judiciary Committee Chairman Orrin Hatch is a long-time ABA critic. Though he has taken no official position, a recent Judiciary Committee press release stated, "The ABA should henceforth play no official, quasi-constitutional role in the Senate's confirmation process."

Defining Democracy

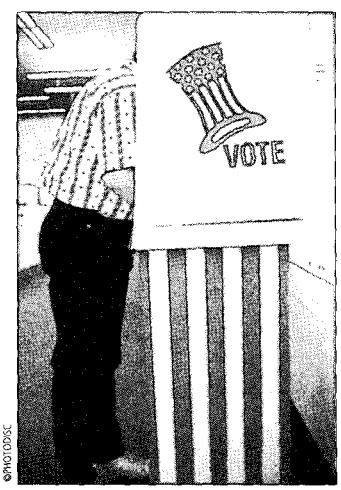
By Rick Henderson

Passing referenda on issues from taxes to car insurance, racial preferences to welfare benefits for immigrants, California is the land of the ballot initiative. But it has also become the home of the constitutional challenge, as opponents of successful initiatives rush to the courthouse to test the legality of any voter measure the moment it passes. Provisions of Proposition 187, the immigration referendum that passed in 1994, remain tied up in a trial court. And last year's California Civil Rights Initiative may also face years of litigious delays.

Rep. Sonny Bono (R-Calif.), the only non-lawyer on the House Judiciary Committee, wants to discourage those who would use the courts to block the implementation of an initiative simply because they backed the losing side. For the second consecutive session of Congress, Bono has introduced HR 1170, the State Initiative Fairness Act.

Following the same procedure used to review challenges to the Voting Rights Act, Bono's bill would require federal courts to set up a three-judge panel to decide any constitutional challenge to a statewide initiative. At least one of the judges must sit on an appellate court. Requiring three judges rather than one to initially rule on the constitutionality of a referendum should curtail "judge shopping." Opponents today often find a sympathetic trial judge who, by issuing restraining orders or using other legal mechanisms, can leave the fate of an initiative in limbo for years. Another provision of the bill would require any appeal of the initial panel's decision to go directly before the U.S. Supreme Court.

Bono's bill passed the House by a healthy 266–159



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SOURCES

"An environmental truism may not be so true after all. Experts have tended to assume that a country's environmental impact—measured as pollution or resource use—swells as it gets bigger, richer, and more technologically advanced....But according to an analysis by two sociologists in the current issue of the *Proceedings of the National Academy of Sciences,* two factors in the equation—affluence and technology—may not always harm the environment after all."
—Find out how green alarmist Paul Ehrlich's IPAT formula falls apart when researchers, as they say, "discipline the debate with data," in the January 9 news entry at InSCIght (**www.europe.apnet.com/inSCIght/**), a Web site operated by *Science* magazine and the Academic Press. This site includes highlights from *Science* and news from other academic sources.

"Behavioral scientists have begun to question, with increasing vigor, whether DARE is little more than a feel-good scheme of enormous proportions....For the past five years, DARE has used tactics ranging from bullying journalists to manipulating the facts to mounting campaigns in order to intimidate government officials and stop news organizations, researchers and parents from criticizing the program."
—Stephen Glass, in the March 3 *New Republic,* explaining why DARE remains the nation's leading drug education program. (For an earlier look at DARE's shortcomings, see "Truth or DARE," March 1995, available on *Reason Online* at **www.reasonmag.com/9503/fe.dare.text.html**) The text of Glass's hard-hitting piece is available on the Electronic Newsstand at **www.enews.com/magazines/tnr/textonly/030397/txtglass030397.html**

BRICKBATS

◆ We are the police, and we're here to make you safe. Unless you live near a drug dealer. Police in Fitchburg, Massachusetts, raided an apartment where they suspected drugs and guns were hoarded. They threw a flash grenade into the apartment to distract the suspect. The grenade touched off a fire that left six officers injured and two dozen residents of the building homeless. But the police got their drug dealer.

◆ Washington, D.C., resident Valcencia Mohammed was out of work. She had been a school board member, but Congress abolished the D.C. school board earlier this year. Mohammed ran for city council last year, but failed. So she did what other Americans out of work do: filed for unemployment insurance. D.C. and Hawaii are the only parts of the United States that let politicians claim those benefits.

◆ Mile High Adventurers is an airline with a twist. The California firm is a charter service that allows people to, ah, fulfill their romantic fantasies in the air. It operates out of the Van Nuys Airport, and some folks who live near that airport are appalled. "This is the last straw—people fornicating in the skies over our city," says Gerald Silver, president of Homeowners of Encino. "What people do in their own bedroom is their business. What they do over our heads is the community's business."

◆ A Canadian art student has embarked on an ambitious project. Jubal Brown plans to vomit—in a primary color—on at least three famous paintings. ▶

Henry Payne

margin last session but was never scheduled for a Senate vote. Bono is talking with several members of the Senate Judiciary Committee, hoping one of them will sponsor this bill.

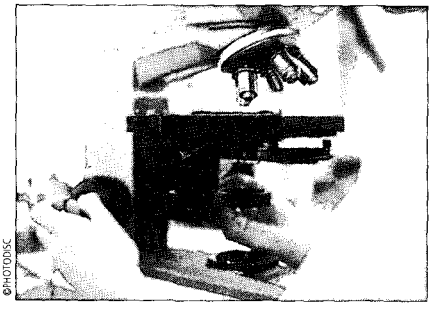
Cannabis Catch-22

By Jacob Sullum

In response to initiatives in California and Arizona approving the medical use of marijuana, drug czar Barry McCaffrey at first claimed "there is not a shred of scientific evidence" that cannabis has therapeutic applications. Yet in January, McCaffrey announced that his Office of National Drug Control Policy would give the National Academy of Sciences $1 million to review the evidence of marijuana's medical utility.

Nearly a decade ago, the Drug Enforcement Administration's own administrative law judge, after two years of testimony, called marijuana "one of the safest therapeutically active substances known to man" and said it should be available by prescription. Since then, the federal government has blocked research on medical uses of marijuana, even while insisting that more is needed.

In 1994, after two years of effort, Dr. Donald Abrams, a researcher at the University of California at San Francisco, won approval from the Food and Drug Administration for a pilot study of marijuana as a treatment for AIDS wasting syndrome. But Abrams has been unable to obtain a legal supply of the drug. The DEA would not let him import it from the Netherlands, and the National Institute on Drug Abuse, which manages the only legal source of research marijuana in the United States, has refused to part with any.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In an April 1995 letter, NIDA Director Alan Leshner cited problems with Abrams's research protocol, which had been approved not only by the FDA but also by U.C.-San Francisco's Institutional Review Board, the Scientific Advisory Board of the San Francisco Community Consortium, and the California Research Advisory Panel. A few months later, Leshner said NIDA would provide the marijuana if the project received the blessing of a National Institutes of Health peer review panel. The only way to get that approval was to submit a grant application to the NIH, so Abrams revised his research plan, transforming what had been a relatively straightforward, privately funded out-patient study into a complex in-patient study requiring $300,000 in government support. The NIH rejected his grant application last August.

Meanwhile, researchers in Washington state hope to obtain FDA approval for studies of marijuana's effectiveness

in relieving symptoms or treatment side effects in patients suffering from cancer, glaucoma, AIDS, multiple sclerosis, and other serious illnesses. The Washington legislature allocated money for the project, which is being managed by the Department of Health and the Board of Pharmacy, last year. If the project is approved and NIDA won't provide marijuana, the state might use cannabis seized by law enforcement. The Massachusetts Department of Health, which in January announced a certification program for some medical uses of marijuana, will also seek FDA clearance for research.

At an NIH-sponsored conference in February, an FDA official said marijuana would be made legally available only if research showed that it was superior to current treatments—a standard higher than the one usually applied to new drugs. The NIH appointed a panel of physicians to consider the future of medical marijuana research and make recommendations within a month.

SOUNDBITE

Dammit Janet

Before his meeting with Attorney General Janet Reno on November 18, 1993, actor Michael Moriarty says he was "plugged into the liberal establishment [and] filled with liberal good intentions." He was transformed after Reno began to threaten legislation against the television industry.

Believing her proposals unconstitutional and her treatment of him and several TV executives arrogant, Moriarty protested vehemently to his employers, the president, the press, and Reno herself. The publicity, he maintains, got him fired from his four-year starring role on the police drama *Law and Order*. Now living in Halifax, Nova Scotia, he continues to be an outspoken, sometimes bitter critic of U.S. government excesses, from TV censorship to Waco and the so-called war on drugs.

While touring in the lead role with the Broadway production of *My Fair Lady*, Moriarty gave an interview to Adrienne Redd, a Philadelphia-area writer.

Q: It was the confrontation with Attorney General Reno that changed you?

A: The amazing thing is that I wasn't an activist. Then I felt like a child in a building on fire, screaming "Fire! Fire!" and nobody listens. The people who did listen didn't leave the building—they went to the right side of the building and voted for Newt Gingrich. And they're still in the building and the building is still burning.

In three years I've become a different man. I consider myself a kind of a one-man government-in-exile. I don't want to call it a government—let's call it one man's idea of American freedom in exile.

Q: What are some of the things our government does that disturb you?

A: Laws against things like drugs are inhumane, and create an inhumane society and inhumane law enforcement. I know what's causing violence in America—the damn drug laws. I used to think, "I'm earning a million dollars a year or close to it with *Law and Order*. I don't have to worry about drug laws." Little did I know that it would come back to me, because if the drug laws aren't the cause of violence, what is? It's television's fault. That's the scapegoat. That's why I was bounced from *Law and Order*.

Q: Why is it that other members of the entertainment industry support Clinton and Reno?

A: Because they won't get invited to the White House if they don't.

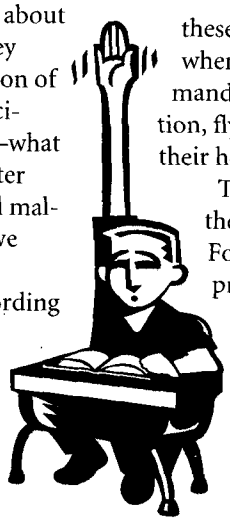
Q: If Clinton is indebted to the entertainment industry, why does he want to censor it?

A: The biggest threat to any politician is an artist. Comedians unleashed can do a great deal of damage. David Letterman can do more damage than any Republican assault by Newt Gingrich.

More Dirty Looks, Please

By Nick Gillespie

Traditionally, when students talked about disliking school, they faulted the imposition of rigid schedules, discipline, and the like—what Huck Finn, the poster child of educational malcontents, would have called attempts to "sivilize" kids. According to a recent nationwide poll of over 1,300 high school students, however, *things are different* these days: Students hate it when schools fail to demand that they pay attention, fly straight, and do all their homework.



The poll, conducted by the Public Agenda Foundation, a nonprofit public opinion research group, asked students questions about a wide variety of education-related topics. The findings are published in *Getting By: What American Teenagers Really Think About Their Schools.* "Large numbers" of teenagers, summarizes the report, "say there are too many disruptive students in their classes...and a lack of discipline and challenge in the schools they attend."

More than seven out of 10 respondents claimed that most kids would pay more attention and do more work with higher standards, and fully half believe that schools fail "to challenge students to do their best." As one Seattle public school student told a focus group, "You can just glide through....They practically hand you a diploma."

The attitudes were consistent across ethnic lines but markedly lower among private school students. Only 19 percent of private school kids, for instance, felt their schools failed to challenge them enough. ▶

BRICKBATS

He's already puked blue on a Mondrian in New York's Museum of Modern Art. And he upchucked red on a painting by Raoul Dufy in the Art Gallery of Ontario. Next up is yellow on a painting and place that he won't announce yet. Brown says his intention is "to destroy art, to liberate individuals and living creatures from its banal, oppressive representation."

◆ Honor someone and something. Remember something else and keep it somewhere. A poll of 100 Danish ministers found that 80 percent could not recite all of the 10 commandments. Three ministers even tried to entice someone to break one of the commandments—or at least a common interpretation—by telling their wives to say they weren't at home.

◆ In Malawi, a tribal chief thought that an acrobatic troupe's performance mocked traditional dances, so he banished the group from the area and fined local leaders who permitted the performance five goats each. The bar owner who hired the acrobats had to pony up one cow for his role in the crime.

◆ Last year, the state of New York legalized the popular new no-holds-barred fighting contests. Two different tournaments were announced in the state, and all hell broke loose. *The New York Times*, the governor, and the mayor of New York City denounced the events as barbaric. And, despite the law, the state athletic commission ran the events out of the state. Then the state legislature passed a bill to criminalize the events once ▶

Chip Bok

A Matter of Preferences

By Michael W. Lynch

Hardship turned into hope in a federal courtroom for the backers of California's Proposition 209, who must defeat an ACLU-led legal challenge for the initiative to take effect. On February 10, a randomly drawn panel of three judges heard a challenge to District Judge Thelton Henderson's preliminary injunction against Proposition 209. (See "Treaties or Equal Treatment," Citings, April.) The judges' questions indicate that they are skeptical of the ACLU's claim that Prop. 209 is unconstitutional because it alters the political process to make it harder for minorities to secure preferences while doing nothing to prevent government from setting up preferences for veterans and the poor.

Judge Andrew J. Kleinfeld pressed ACLU attorney Mark Rosenbaum on this issue of political potency. "In any jurisdiction other than a mining camp," Kleinfeld stated, "women are a majority, and women and minorities combined are certainly a majority of voters." Kleinfeld also asked Rosenbaum at what point would it be permissible for the voters of a state to determine that racial preference programs had outlived their usefulness. Rosenbaum responded that "the people of California are not entitled to make [that] decision—that is for the courts."

It sounds like we have "government of, by and for the people" replaced with "government of the people by those with the highest LSAT scores," Kleinfeld retorted.

Defenders of Prop. 209 are cautiously optimistic about the panel's ruling. "The hearing gave us some reason to believe that the judges have been persuaded by our position," says Prop. 209 co-author Tom Wood. (For continuing updates on Prop. 209's progress, see the Prop. 209 Watch reports filed by Manny Klausner for *Reason Online*, www.reasonmag.com.)

Deficit Deception

By Ed Carson

It's an article of faith among Democrats that President Reagan was responsible for the doubling of the national debt during the 1980s. Not so, say Stephen Moore, director of fiscal policy studies at the Cato Institute, and investment analyst Michael A. Byrd in a new Institute for Policy Innovation report,

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"Whose Free Lunch?: The Truth About the 'Reagan Deficits.'" Like so many others before them, Moore and Byrd rebut claims that tax cuts drained the federal Treasury. They point out that tax revenues increased 24.1 percent between 1982 and 1989, virtually identical to the 24.4 percent rise from 1974 to

ARTIFACT

AP/WIDE WORLD PHOTOS

The Science of the Lambs

All humanity flinched when Dolly the cloned sheep was unexpectedly introduced in February. But the outcry of concern that followed—Should this be allowed? What will become of mankind? Let's set some limits!—was less policy or morality than a vein of pop culture come to life. Science-horror had made the front page. Lurking behind Dolly were generations of a folkloric nightmare—the mad scientist—going back beyond Dr. Moreau and Dr. Frankenstein to the alchemists and the popular conviction that science was at the service of Satan.

"There are things man is not meant to know," goes the underlying cliché. Knowledge is dangerous, advance means peril; better to blow out the candle than to see what is revealed in the darkness. It is true that Dolly raises questions: Would you want to be a clone? But it is also true that, one day, this question is likely to be considered socially discriminatory.

NIH scientists admitted that this experiment would never have passed federal grant muster; it asked the "wrong" research questions. Well, here are some of the right questions: What sort of victim-group rights will cloned humans demand? Will Congress have to be redistricted on their behalf? And, if you count cloned sheep to fall asleep, do you ever get past number one?

—Charles Paul Freund

1981, and *higher* than the 19.3 percent growth projected for 1990–1997, after the Bush and Clinton tax hikes.

But former Senate Majority Leader Robert C. Byrd maintains that if Congress had approved Reagan's appropriations requests, the deficit would have been even higher. True and false, say the report's authors. Reagan did request about $90 billion more for defense appropriations. But Byrd's claim leaves out entitlement programs, which make up over half the federal budget. If all of Reagan's requests had been approved, spending would have been $209 billion lower.

And when Democrats controlled both houses in 1987–1988, congressional spending exceeded the president's requests by an average of $51 billion, far above the $20 billion average when Republicans controlled the Senate from 1981 to 1986.

Moore and Byrd don't absolve Reagan for the deficits during the 1980s, noting that he exercised his veto power sparingly and never submitted a balanced budget. They simply state that Congress, particularly Democrat members, deserves more of the responsibility.

Mises Papers Recovered

By Brian Doherty

A treasure trove of 20th-century economic and libertarian history, long thought destroyed by the Nazis, has been recently recovered and brought—on microfilm, at least—to the United States.

Ludwig von Mises, linchpin of the 20th-century free market Austrian economic tradition and author of such classics of 20th-century political and economic liberalism as *Socialism* and *Human Action*, left his papers and correspondence behind in his native Vienna when he went to teach in Switzerland in 1934. When the Nazis occupied Austria in March 1938, they went to arrest Mises but instead found only his documents. Mises and his wife, who ended up in the United States after the war, assumed the Nazis destroyed the papers.

They didn't. They merely shipped them to a storage house of stolen documents in Czechoslovakia, which was occupied by the Soviet army at the war's end. The Soviets moved the documents to Moscow, where the KGB carefully organized and catalogued them. While researching a forthcoming biography of Mises, Richard Ebeling of Hillsdale College in Michigan discovered their continued existence at Moscow's Center for Historical and Documental Collections. "This is an incredibly exciting find," Ebeling says. "It's a very significant period of Mises's life, records of which we thought were lost."

Ebeling visited the Holocaust Museum in Washington last July to inquire about Gestapo files on Mises. The museum didn't have any, but a researcher there had a list of historical archives in Moscow related to the war, and he showed Ebeling an entry for archival papers on Ludwig von Mises.

The documents date back to Mises's army service during World War I and include both sides of his correspon-▶

BRICKBATS

more. But this bill also bans firms from profiting in any way from the fights. It seems to ban newspapers from taking ads for such fights, cable companies from carrying them, and stores from renting or selling videos of the contests—even if they are held somewhere other than New York. The First Amendment ended up taking a body shot in this fight.

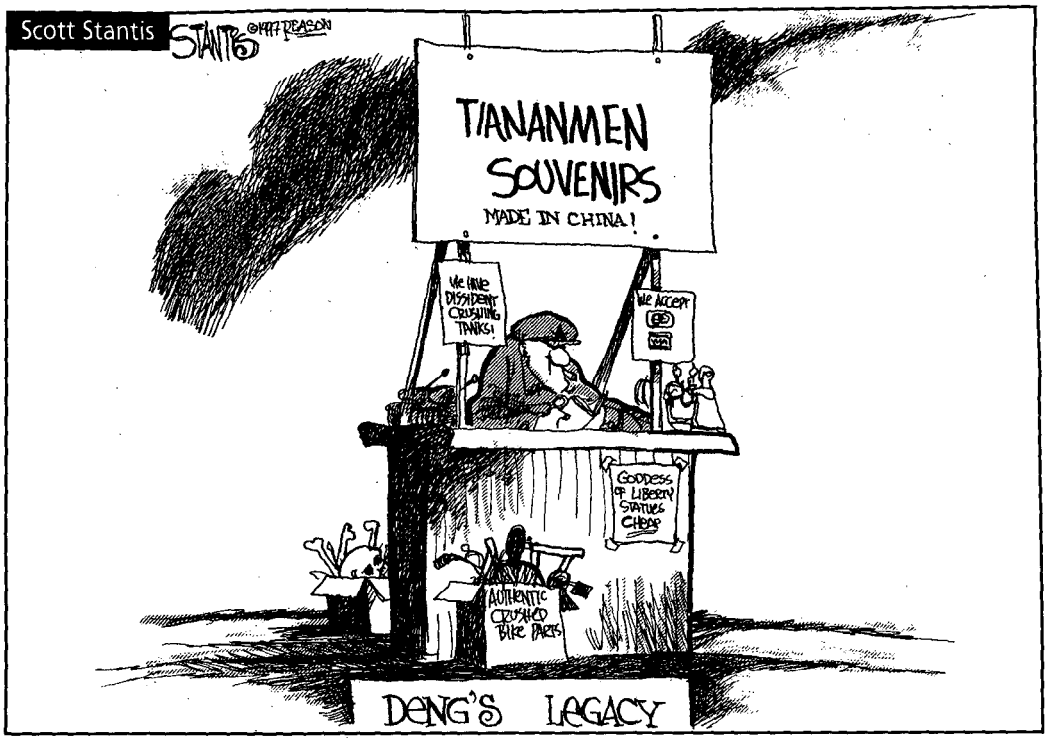
◆ President Clinton's State of the Union speech contained much, uh, wisdom. But nothing matches this gem: "The United States must look not only west, to Europe, but also east, to Asia." Next time, Bill, look at a map before speaking.

◆ China long ago banned independent churches, and it still punishes those who worship in non-sanctioned congregations. About 80 members of an underground Catholic church have been arrested, jailed, and beaten in Jiangxi province.

◆ New York City cop Andrew Schlagler has been arrested on charges of harassment. He went into a bar and allegedly plastered stickers with violent, racist messages on windows, booths, and patrons' clothes.

◆ Also in New York City, employees of a shelter for battered women have been dismissed following allegations that the workers coerced women into sex, used drugs, and let abusive boyfriends and husbands into the shelter. The shelter is the only one for battered women run by city workers. The rest are run by private agencies.

—Charles Oliver



dences. They also contain lecture notes and course outlines of his teachings at the University of Vienna and his private seminars, attended by such later giants of economics and political philosophy as Nobel laureate F.A. Hayek and Lionel Robbins, head of the London School of Economics in the 1930s.

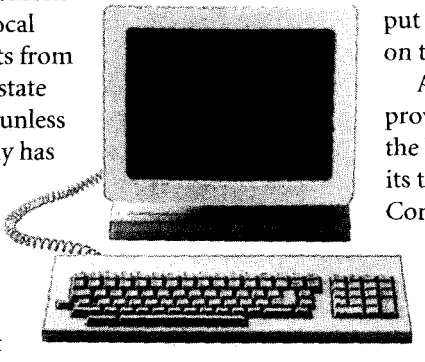
Ebeling photocopied or microfilmed almost all of the 10,000 items in Moscow. They are now being archived and translated by Hillsdale, to whom Mises left what papers he still had when he died. Appropriately, Hillsdale is one of the rare U.S. colleges that accept no government money, including scholarship money from government sources.

Stop the Madness

By Ed Carson

In an effort to head off "cyber tax chaos," Rep. Christopher Cox (R-Calif.) and Sen. Ron Wyden (D-Ore.) are introducing a bill that would place a moratorium on new Internet taxes. The bill, which had not been finalized at press time, would prevent state or local governments from passing any new Internet taxes, including sales and telecommunications taxes. It would apply retroactively, probably to January 1, 1997.

Sales on the Internet totaled $500 million in 1996, but could grow to tens of billions by 2000. States and local governments see the Internet as a potentially huge source of revenue. But there are a number of unresolved practical, legal, and constitutional issues (See Citings, January and March). The U.S. Constitution prohibits states and local governments from taxing interstate commerce, unless the company has a substantial physical presence within their jurisdiction. But due to the decentralized nature of the Internet, several states could claim a taxable nexus on any given electronic sale. Even if the nexus is clear, collecting taxes won't be easy.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"Before these fundamental questions are answered," Cox says, "states and localities are rushing to tax the goose that lays golden eggs."

To help answer these questions, the bill would require the Clinton administration to submit a comprehensive plan regarding electronic commerce taxes within two years. One solution that's been proposed is to create a national sales tax, but a recent Treasury Department white paper put the kibosh on that idea.

Another provision in the bill prohibits the Federal Communications Commission from levying

access charges —currently limited to telephone companies—on Internet service providers.

Cox and Wyden, who teamed up two years ago to promote an ultimately unsuccessful anti-regulatory alternative to the Communications Decency Act, hope to move the legislation through Congress quickly, before the appropriations bills make their way to the floor.

Trump Change

By Rick Henderson

Mention "eminent domain," and most people think of the government obtaining land to build such public works as roads or bridges. But authorities in New Jersey have moved well beyond the boundaries set in the U.S. Constitution—"nor shall private property be taken for public use, without just compensation"—to establish a process that lets the owners of gambling casinos scarf up land adjacent to their properties at fire-sale prices.

Soon after casino gambling was legalized there in 1979, New Jersey established the Casino Reinvestment Development Authority and gave it the power of eminent domain to help casino investors buy private property. Once a developer finds the land he wants to acquire and a city planning board approves the project, the CRDA simply makes a purchase offer and, if the owner demurs, asks a state court to condemn the property.

Arguing that the CRDA's actions violate the U.S. and New Jersey constitutions, the Washington, D.C.-based Institute for Justice is representing Vera Coking, a widow who owns a boarding house in Atlantic City that has attracted the attention of millionaire developer Donald Trump. Trump wants to buy the property, raze the house, and use the land as a staging area for limousines at his adjacent Trump Plaza hotel and casino.

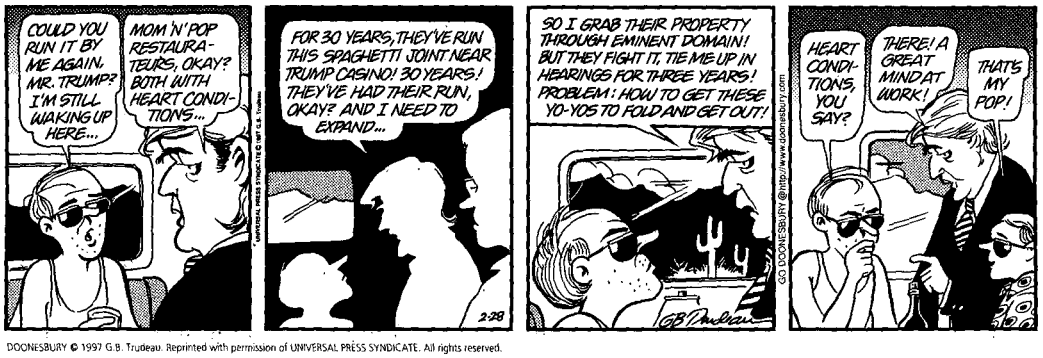
Back in 1983, Coking rejected a $1 million offer by *Penthouse* publisher Bob Guccione, who wanted to build a casino. But after Trump Plaza was approved in 1994, the CRDA notified her that the "appraised" value of her land was a mere $251,250. It gave her 30 days to accept that amount or face condemnation proceedings. She fought the condemnation and won in Atlantic County Superior Court, only to have the ruling overturned on appeal.

The institute is representing Coking before the New Jersey Supreme Court, arguing in part that the CRDA would be taking private property for private use because Trump, not Atlantic City, would own the land. It also contends that the law establishing the CRDA gives the agency eminent domain powers only when acquiring a plot of land is essential to complete a project. Yet Trump Plaza has been operating for more than a year. If left unchecked, the taking has troubling ramifications: A CRDA victory could establish a precedent giving governments unlimited ability to appraise, condemn, and confiscate private property for the benefit of well-heeled private parties.

The U.S. Supreme Court has upheld such "private" takings since the 1954 *Berman v. Parker* decision, which transfered property from one department store owner to another. If this case reaches the U.S. Supreme Court, the institute hopes the Court would again place some limits on "public use."

Two of Coking's neighbors, restaurateur Vincent Sabatini and jeweler Peter Banin, are separately suing the CRDA and Trump. Sabatini's plight was chronicled in *Doonesbury* the weeks of February 24 and March 10, marking the second time in recent months (an earlier series concerned medical marijuana) the strip has taken libertarian stands.

Doonesbury BY GARRY TRUDEAU


COULD YOU RUN IT BY ME AGAIN, MR. TRUMP? I'M STILL WAKING UP HERE...
MOM 'N' POP RESTAURATEURS, OKAY? BOTH WITH HEART CONDITIONS...
FOR 30 YEARS, THEY'VE RUN THIS SPAGHETTI JOINT NEAR TRUMP CASINO! 30 YEARS! THEY'VE HAD THEIR RUN, OKAY? AND I NEED TO EXPAND...
SO I GRAB THEIR PROPERTY THROUGH EMINENT DOMAIN! BUT THEY FIGHT IT, TIE ME UP IN HEARINGS FOR THREE YEARS! PROBLEM: HOW TO GET THESE YO-YOS TO FOLD AND GET OUT!
HEART CONDITIONS, YOU SAY?
THERE! A GREAT MIND AT WORK!
THAT'S MY POP!

DOONESBURY © 1997 G.B. Trudeau. Reprinted with permission of UNIVERSAL PRESS SYNDICATE. All rights reserved.

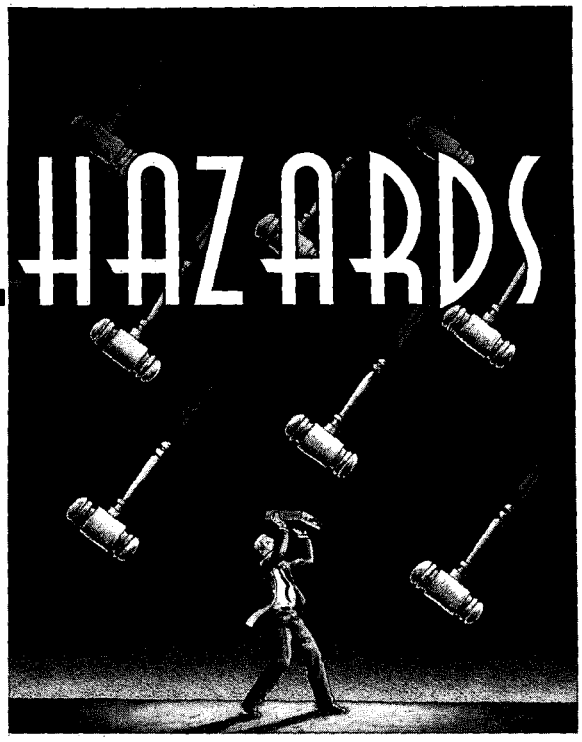
QUOTES

"West Virginia...became a state as part of the Civil War and stood with the Union. During the reauthorization of ISTEA, I intend to do the same: to stand with the Union, with the national interest in the federal highway program."
—Rep. Nick Rahall (W.Va.), ranking Democrat on the House Surface Transportation Subcommittee, discussing the Intermodal Surface Transportation Efficiency Act

"Today's North Korea has nothing to do with socialism. How can a society in which people, workers, farmers and intellectuals are starving to death be a socialist society?"
—North Korean defector Hwang Jang Yop, an architect of that country's policies for decades, in a note published by the South Korean newspaper *Chosun Ilbo*

"Whatever their limitations, Freud and Marx developed complex and subtle theories of human nature grounded in their observation of individual and social behavior. The crackpot rationalism of free-market economics merely relies on an abstract model of how people 'must' behave."
—Ellen Willis, director of the cultural journalism program at New York University, in a letter to *The New York Times*, February 27, 1997

OCCUPATIONAL HAZARDS



Why "sued if you do, sued if you don't" is the new rule in employment law.

By Walter Olson

It was a case of "a basic lack of human decency," a "sickness in the organization." Exxon knew its captain had a history of alcoholism, yet it chose to let him command a tanker, accepting his story that his problems were behind him. And the result? The *Exxon Valdez* had run aground in Alaska's Prince William Sound, causing one of history's worst oil spills. And it happened because the giant company had taken a "callous, cold-hearted business risk."

Thus, in his closing arguments, spake the plaintiff's attorney suing Exxon in the main damage case resulting from the spill. To reflect the uncomplicated nature of the moral issues at stake, he even quoted from the best-selling book of homilies *Everything I Know I Learned in Kindergarten.* Reason enough, he said, for a punitive damage award of $20 billion for his clients. (Contingency fees for plaintiff's lawyers commonly run at around a third of the total award.) The jury, doubtless thinking itself moderate, responded by awarding $5 billion.

In other courtrooms, meanwhile, other lawyers were suing Exxon on other grounds. In particular, they were suing on behalf of workers with drinking pasts whom the company had taken off safety-sensitive positions. By the mid-1990s at least 100 challenges to the company's substance abuse policies had been filed, and dozens of cases were pending around the country. Lawyers citing language in the company's employee handbook, which they argued should be treated as a binding contract, had already won one big verdict for an officer in Portland, Maine, whom Exxon had transferred with no cut in pay. "Public perception of the Valdez incident as having been caused by a recovering alcoholic," declared a Department of Labor administrative law judge in 1992, "does not justify discrimination against all recovering alcoholics."

It became a standing joke: After the lawyers were done suing you up one side of the street, they'd sue you down the other. They'd sue when you gave a bad reference, then sue for failure to warn—failure to give a bad reference—when your old employee committed some atrocity in his new job. They'd sue when you turned away a job applicant with a violent or criminal past, or sue if you did take him and he hurt someone: A landmark California case allowed a negligent-hiring suit against a laundromat owner who'd taken on an unstable halfway-house graduate, though the man had no criminal record.

Rules on dating and nepotism are another sued-if-you-do, sued-if-you-don't favorite. Letting office mates get romantically involved invites suits by other workers charging favoritism or sexualized environment, or more commonly suits by the junior-ranking participant in the affair charging hostile environment or retaliation after it ends. Even third parties may have claims: A Texas court ruled in 1994 that the spouse of an employee carrying on an adulterous affair could sue the company for letting it happen. But clamping down runs into claims of privacy invasion, interference with off-hours conduct, defamation, and so forth. Companies have been sued both for carrying on nepotism (unfair to minorities who aren't in the family) and for enforcing rules against it (unfair to married couples).

Litigators have targeted employers over "English-only" rules that prevent workers from talking among themselves in the language with which they're most at home. Yet New York's Bellevue Hospital lost when an English-speaking nurse sued, charging that co-workers' casual use of the Filipino language Tagalog kept her from doing her job by depriving her of critical information about patients. Federal law and fear of accident liability push companies to carry on employee drug testing even where they might not wish to do so, but guessing wrong about which employees may be put through such tests has led to six-figure verdicts. Then there's the perennial puzzle of how to find out about employees' protected-group status, so as to file all the proper reports and the like, without seeming to take an interest in the topic. "We're not supposed to ask, but we are supposed to know," as more than one business person has put it.

"Disparate impact" doctrine leads to compliance jams too. Courts have generally held it unlawful for companies voluntarily to accord hiring preference to U.S. war veterans, since such policies have adverse impact on women. But some laws on the books require many private employers to observe such a preference. To resolve the issue, it was ruled that veterans' preferences would be forbidden everywhere they weren't mandatory and mandatory everywhere they weren't forbidden—the truly unthinkable alternative, of course, being to allow employers to follow their own wishes on the subject.

The discipline of misbehaving workers is a constant source of double binds. The sheriff of Suffolk County, New York, tried to fire two white officers he considered responsible for fairly egregious taunting of minority workers in the county prison system, but civil service appeals gave them their jobs back; the county proceeded to lose a huge harassment case filed by the outraged minority workers. Civil service and union protections often lead to reinstatement of sex harassers as well.

Over the past 35 years, legislators, regulators, and courts have invented and imposed on the American workplace a vast and ambitious new body of law ranging from harassment and handicap-accommodation law to age discrimination law to family leave to new common-law doctrines making employers liable for "wrongful termination," "workplace defamation," infliction of emotional distress by harsh supervision, and much more. Practicing lawyers refer to this new field as employment law, and distinguish it from the earlier labor law associated with the New Deal. It is mostly advanced not by unions—nor in fact by collective worker sentiment or action of any sort—but by lawyers' threats to sue for large damages on behalf of some (often just one) worker. It aspires to regulate not just hiring, firing, and wage-setting, but the whole range of working conditions, very much including stress, verbal criticism that workers find hurtful, and similar psychological intangibles of the sort summed up in a famous phrase from harassment law, "hostile work environment."

To hear many descriptions of the new employment law, you'd think its main challenge for employers was simply to summon the force of character to behave properly. "It is as simple as requiring everyone on the job to treat everyone with decency and respect," *The Washington Post* editorialized after a harassment ruling. "The law simply codifies courtesy," said an advocate quoted in a *New York Times* account which announced that employers "need not fret" about compliance with the new Americans with Disabilities Act. Another agreed: "This isn't rocket science." Several academics writing in the *Law and Society Review* reproach employers for wasting effort on defensive management efforts when it would be so much easier for them just to treat workers "more fairly" and "avoid discharging employees without good cause."

Employers found liable in court verdicts, or sometimes even just those taken to court in the first place, are often assumed to have acted in defiance of clear legal dictates. "Managers who follow generally accepted principles of management, and keep in mind the general dictates of the law, do not get sued," contends the author of the self-help guidebook *Your Rights at Work.* Any litigation that may arise under the ADA, declared a *Wall Street Journal* letter writer, "will occur solely because...civil rights...have been ignored."

No more absurd view could be imagined. Employers cannot knowingly and fully comply with the new employment law the way a wage earner can be sure he has filed his income taxes by April 15. The new law is voluminous; much of it is vague, so that employers cannot tell exactly what is asked of them but must find out after the fact when courts or regulators rule; it changes constantly and often retroactively; it assigns liability to common workplace interactions that are bound to come up every day; and its dictates are often what lawyers diplomatically call "in tension" with each other. No degree of good faith can keep employers from being taken to court and sometimes losing. Nor can they be sure of victory by sinking any fortune

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into compliance efforts—which does not keep them from trying.

Employers react to this impossible situation in various ways, all unsatisfactory to one degree or another. Some paddle ever more frantically in hopes of reaching the fabled shores of compliance. Some document personnel decisions obsessively, while others put as little on paper as they can get away with. Many hire squadrons of personnel and compliance specialists and in-house lawyers, often yanking authority from front-line managers and professionals in the process. Some adopt clever subterfuge, others resolve to live dangerously and hope they don't get sued, and yet others cultivate ultra-progressive reputations for overcompliance which they hope will count in their favor if they are ever put in the dock. The result is a varied culture of compliance whose one consistent feature is its propensity to usher in personnel practices no one would have thought of adopting for any other reason.

One of the most obvious problems with the new law is its sheer voluminousness. One survey found federal personnel managers were bound by 850 pages of directly pertinent law and 1,300 pages of regulations, aside from roomsful of commentary and case law. Private managers are not far behind. Race and sex and age, disability, harassment, family leave, common-law wrongful termination, employee privacy, and defamation each generate volumes of laws, regulations, and court interpretations analyzed in commercially available manuals and case reporters. Former IRS official Alvin Lurie has observed that, though employers have spent scores of billions trying to comply with the federal pension law he once oversaw, "even experts cannot understand" it, with the result that there "continues to be massive noncompliance"—the law operating on two levels, an incomprehensible "official" law and a "vulgate." Companies that do as much as $10,000 of business with the government come under thousands of pages of distinct additional rules for contractors.

"Absent discrimination," the Equal Employment Opportunity Commission has proclaimed, "one would expect a nearly random distribution of women and minorities in all jobs." Absurd though that standard may be, it guarantees the commission a full docket till doomsday.

The ADA, Civil Rights Restoration Act of 1991, and Family and Medical Leave Act all hit within a few years in the early 1990s. And those laws, at least, were the outcome of a conventional legislative process: published in official records and widely publicized before becoming effective at a future date. Much of employment law was never preannounced or published as such at all, instead taking the form of judicial innovations fastened on unsuspecting employers who hadn't a clue that the law's interpretation was going to change. (In fact, flying in the face of very old ideas about the rule of law, advocates have more than once endorsed the idea that newly passed statutes should be applied retroactively; they lost a round when the Supreme Court declined to read retroactivity into the 1991 civil rights act's silence on the subject, but have won on some other occasions.) Regulators, too, periodically redefine as prohibited vast swaths of formerly accepted behavior.

Even more corrosive is the vagueness. How is an employer supposed to tell which of its employees count as legally disabled and thus covered by the ADA, how much accommodation for which of them is reasonable, when the costs of compliance finally amount to undue hardship, when a boisterous or tense working environment reaches the point of being hostile, when a suspension or failure to promote will count as having been for good cause? The answer is that it frequently does not and cannot know. Complying with laws of this sort is not like stopping for red lights or staying within a speed limit; one would wait forever for the light to turn green, and being an employer is unsafe at any speed. Instead you must act first and then learn later whether you've acted lawfully, when a lawyer hauls you before a jury to demand a fortune.

Constant jeopardy is inevitable as well because the law takes so many commonplace work situations and turns them into potential suits. Not only is every firing open to challenge; so is every failure to hire or promote, as well as an endless array of problematic working conditions, pay disparities, and criticisms or other remarks that might have given pain. (As Camille Paglia puts it, every workplace is hostile.) Pretty much all employee selection and evaluation methods, very much including the subjective and word-of-mouth methods most in use, show disparate impact or are legally suspect for some other reason. "Absent discrimination," the Equal Employment Opportunity Commission has proclaimed in one of its baldest defiances of reality, "one would expect a nearly random distribution of women and minorities in all jobs." Absurd though that standard may be, it guarantees the commission a full docket till doomsday.

Shrewd enforcers know they do *not* want regulated parties to achieve definite compliance; that would badly undercut the basis of their power. When the EEOC issued its landmark rules on the use of employment tests, a Justice Department official observed that "the thrust of the proposed Guidelines is to place almost all test users in a posture of noncompliance" while giving "great discretion to enforcement personnel to determine who should be prosecuted." That discretion suited enforcers just fine, since it meant their inspectors met a very obliging if not obsequious reception. Alfred Blumrosen, a professor at Rutgers law school who directed the EEOC's enforcement operations for many years, has described the agency's periodic inspection visits to large employers during his years as a "nibbling" approach—"the government will take an arm this year and come back next year for an ear or a leg." At each visit inspectors could add new demands "where the violations appear clearest or where the resistance to change might be less." (Uniroyal got an unpleasant surprise this way in one early case: An inspector had observed and let go its practice of maintaining separate seniority lists by department, a then-common practice; later officials decided it ought to be against the law, costing the tire company an estimated $15 million to $20

million in resulting contract-debarment proceedings.) An important point, in Blumrosen's view, is that "the government does not give the regulated institution a clean bill of health" at any point in the process.

Almost by necessity, staying abreast of legal obligations now tends to become a specialized function within employers. Line managers simply cannot assimilate the whole mass of new law; even if they each took a sabbatical year to study their legal obligations, the flow of new laws, regulations, and court rulings would soon render their knowledge dangerously obsolete. Increasingly, therefore, all large employers and many of the small maintain ongoing and formal efforts devoted to compliance. Even if they can't bring full compliance within reach, these departments can make a valuable contribution by improving the employer's odds.

A serious compliance effort can be expensive even for an employer with no unusual work force problems. Some internal inspection process will be recommended to check on whether far-flung offices have followed company policy. The government has provided a steady diet of new responsibilities for personnel specialists: harassment and sensitivity training and complaint hotlines, disability and language accommodation issues, "family-friendly" policies with their growing legal component, and on and on. Since staying current on the ever-changing law is of the essence in all these areas, one soon tends to become a customer of the sprawling industry of seminars and conferences, looseleaf services, newsletters, and hotlines on new developments.

Compliance incentives often cut in the direction of standardizing company policy on various personnel issues and practices, centralizing as well as formalizing policy. One reason is that over a wide range of situations, provable inconsistency is more legally dangerous to an employer than foolish consistency. Suppose the job specs for a certain type of position have always called for an MBA, but a dream candidate shows up who isn't one: Bending the rules to take him comes at the risk of giving both past and future disgruntled applicants ammunition to portray the requirement as a mere sham. The problem often comes up in employee discipline cases: It's actually legally dangerous for managers to be lenient in overlooking employees' infractions of company rules. "Uniform application" of a rule against résumé inaccuracies is "critical," warns Detroit attorney George Mesritz, lest the employer lose the right to press the matter in more urgent cases. An *Investor's Business Daily* account likewise advises the employer to resist the temptation to let absenteeism rules go unenforced in the case of an employee with an otherwise fine record, because it could find itself having lost the right to enforce the rules. "Compassionate leave" policies governing such matters as time off when a family member dies get enmeshed in equally dismal complications: Lawyers for other workers may seize on the granting of one variance as a precedent denied their own clients in their less sympathetic situations.

The results are as perverse as anyone could have wished. Fear of the leniency-for-one, leniency-for-all rule leads some companies to discipline or even fire workers they'd rather have retained. Compassionate leave is doled out with an eyedropper on advice of counsel. At the extreme, the totally rule-bound company begins timing people's bathroom breaks.

Many courts and regulators construe inconsistent or informal policies as evidence of a cavalier attitude toward compliance or even as violations in themselves: If a company hasn't kept written records of requests for permission to vary from vacation policy it may not notice a pattern in which women have fared worse than men at getting such permission, which suggests it doesn't *care* whether that happens. The Automobile Club of Michigan lost a case after a court cited its lack of "consistent and public standards" in personnel decisions, including its failure to maintain a "systematic job description and evaluation system." In harassment law and increasingly in other legal areas, failure to maintain a formal policy on a topic can lead to payouts even if the policy would not have prevented or resolved the worker's grievance.

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The pressure for formal consistency and against managerial discretion has helped encourage one of the policies most irritating to ordinary employees, the across-the-board drug test. When companies institute such tests the most frequent question from employees is why they aren't just testing workers who have shown some performance problem suggesting impairment. But singling out an employee that way invites suit for defamation, infliction of emotional distress, and other atrocities. Across-the-board testing intrudes on a far larger class of employees, but is paradoxically safer for most legal purposes because it is freer from the taint of individualized manager discretion.

The threat of company-wide punitive damages is another legal pressure strongly encouraging centralization. Prevailing doctrines allow juries that discover a violation at any of a huge company's far-flung subsidiaries to levy punitive damages based on the parent enterprise's wealth, just as if that parent enterprise were a single brooding intelligence rather than (say) a bunch of fairly autonomous enterprises responding to the center mostly on matters of finance and capitalization. But once higher-ups realize that the off-the-wall personnel decisions of the tiniest operating unit in the smallest town can anger some jury into lopping off a third part of the parent company's assets, many will resolve to make sure nothing of the sort happens by hiring headquarters staff to start issuing central personnel policies, thus becoming (self-fulfillingly) something measurably closer to the lawyer-portrayed octopus of unitary brain and intention.

Another inevitable result of the compliance culture is the growing number and clout of attorneys within organizations of all sorts. Lawyers, both in-house and outside, are needed

to vet employee communications; hover in the background in dismissals, individual reprimands, or warnings; monitor the keeping and timely destruction of personnel records; plan layoffs and buyouts; and on and on.

Many of the compliance issues surrounding the ADA offer case studies in how sweeping employment laws tend to abet centralization and bureaucratization in the workplace.

In one of its least-noted but most disturbing effects, the ADA gives employers powerful new reason to devise and adhere to formal job descriptions. The law holds that a disabled worker turned down for a job because he can perform only some of its functions can sue on the grounds that the other duties are not truly essential. Aware that this "essential functions" doctrine opens up formidable scope for messy factual disputes, the law provides that courts should grant some deference to the employer's own ideas on which functions are essential, but on the condition that it put a job description in writing *before* being faced with the disabled person and his particular shortcoming. The rationale for requiring prior written descriptions is that otherwise employers might tailor job requirements to exclude a particular unwanted applicant who has begun raising a fuss.

The drawing up of legally robust job descriptions for this purpose is no light undertaking. To begin with, a job's most fundamental aspects will be among the easiest to overlook: Omit to stipulate that applicants be able to read handwriting, or show up on time, or remain quiet when unattended, and there may be no chance for second thoughts later. It will be highly dangerous to rely on the language of job descriptions prepared earlier without legal implications in mind, which are in any case notoriously inaccurate and incomplete at many companies. An *Employee Relations Law Journal* article advises that descriptions be worded by persons seasoned in ADA issues. It adds that descriptions should draw on "behavioral profiles of successful incumbents" prepared with input from expert psychologists, which at the same time must not demand traits found in uneven proportions among different demographic groups. It's a tall order, for which all but the largest businesses will think of hiring an outside consultant. The expense mounts up: Thus the city of Baytown, Texas, found it would cost $81,000 to have a consultant prepare ADA job descriptions for its 270 job titles, though it managed to reduce the outlay by collaborating with a consortium of similar-sized towns.

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For many organizations, the real cost of ADA job descriptions will go far beyond a consultant's fee. To begin with, many will (rightly) sense that the description on paper is to an extent legally binding on them, even when it begins to seem unrealistic. There will also be a reluctance, common in bureaucracies, to create new job classifications freely or reassign duties among incumbents. For reasons like these, many employers would not want fixed and obligatory job descriptions even if they came drafted with great skill for free. Newer, fast-growing companies in fluid industries are especially prone to disparage the "job-description mentality" in favor of shifting talent around ("forget what you were doing, come over here and help with this"). It is not that the free-form entrepreneurial model is somehow "better" than the highly structured model; different forms appear best for different tasks. But a distinctive strength of the American economy has been its compatibility with both. Economies like Germany's and Canada's, which generate some successful bureaucratically organized companies, have had far more trouble nurturing the entrepreneurial kind. Laws like the ADA tilt our playing field, too, toward the organizationalists.

Companies maintain centralized personnel departments for many reasons other than compliance. Still, it's notable that, per business historians, such departments have seen big jumps in their authority and prestige during three distinct periods in this century, and that each expansion wave has coincided with a period of increased pressure on companies by government, unions, or both. World War I, which brought huge experiments in government control of private business, likewise sparked a huge advance in personnel centralization. There followed a decentralizing reaction in the '20s after the removal of most government controls. The New Deal and World War II then brought another massive expansion: According to historian Sanford Jacoby, the share of mid-sized to large firms with formal personnel departments rose from 34 percent in 1929 to 81 percent by the end of the 1950s. And a third big wave has come with the new employment law.

An entire corps of "diversity professionals" has by now sprung up in larger organizations. Federal regulations, it may be noted, do not leave this process to chance. Contract compliance regulations covering virtually all the nation's largest companies require them to name equal employment opportunity/affirmative action (EEO/AA) officers and vest in them a long list of functions, including many they might otherwise not have chosen to unite in a single officer. Among them: investigating employee complaints; designing "systems that will...indicate need for remedial action"; developing goals, timetables, and "policy statements" on group hiring; providing "interpersonal relations awareness and EEO compliance training and other staff development"; and providing "[c]areer counseling for all employees." They must also be given access to line management, the regulations specify.

These rules go far beyond any plausible concern with ensuring compliance. They appear more like an effort to install a beachhead of EEO culture within each company and guarantee it substantial turf by annexing such functions as career counseling. Surveys indicate that EEO staffs are apt to differ to some extent from the executives around them—for ex-

ample, they appear to view numerical hiring goals more favorably. On the other hand, they are still hired by and answerable to their employers, which means they're more likely to feel torn by conflicting expectations than they are to live up to the hopes of outside grievance organizers.

Still, widely held views of the EEO function encourage these officers to depart in some rather dramatic ways from prevailing norms of organizational loyalty. Seattle attorney Patricia Rose has written that an EEO officer commonly may, along with investigating an employee complaint impartially, offer the complainant "emotional support and counseling....If her mediation and informal resolution efforts fail, the EEO officer routinely helps the aggrieved employee file a complaint with a government enforcement agency." The EEOC has even taken the view in court that giving "aid and comfort" to the employer's legal adversaries is part and parcel of an EEO officer's job, for which the company must not retaliate.

Whether from sincere belief or to improve what lawyers call the atmospherics on future suits, many employers make a big show of enthusiastic support for the new law's spirit as well as letter. A "history of progressive attitudes regarding the advancement of women" makes it easier to prevail as a defendant, observes an *Ohio State Law Journal* writer. Most large companies have ventured into not only compliance and anti-harassment training but more elaborate diversity sessions designed to instill correct attitudes in workers and underline for all to see that the company is really smitten with the new law in the full beauty of its spirit and not just dragging itself into compliance with the crabbed letter. These training sessions commonly feature the trappings of a law-driven effort, such as mandatory attendance and checkoffs so the company can later document that everyone was there.

Other managers—or sometimes managers at the same firms—at some point simply give up trying to comply, reasoning that they can't keep from being sued anyway and may as well run a rational business. Not many bosses refrain from word-of-mouth hiring until they get a validation study, or pay the slightest heed to the rules against criminal-record discrimination, or make sure to advertise in the minority press if they are in the want ads of the big city daily. The "dirty little secret" of job interviewers, a *Wall Street Journal* reporter breathlessly announced, is that lots of them knowingly violate the law on forbidden inquiries and the like. Headhunter searches specifying female candidates are on the rise, though blatantly unlawful. Age bias law, though it keeps producing big verdicts for complainants in court, is among the most routinely ignored parts of the law, especially in hiring. Ad agencies, entertainment companies, and other trend-chasers make few bones about preferring young staffs. A 1995 *New York Times* account credits NBC's dominance in network programming to its success in reaching 18-to-34-year-olds, the "viewers most sought after by advertisers," and depicts NBC's strategy as one of hiring programming executives in that age bracket, including a 31-year-old and two 29-year-olds. "They're the right age." No one is quoted saying that this is the employment-law equivalent of boasting in a Customs inspection line what a good living one makes as a smuggler.

Short of deliberate violation, there's subterfuge. Thus managers learn how to elicit information without asking, or raise their eyebrows just so when asked about an employee. Where restrained from firing they also learn the knack, familiar in civil service settings, of making subordinates' lives unpleasant enough that they think of leaving voluntarily.

Most business managers yearn for legal safe harbors. They wish to know, as Washington, D.C., lawyer James DeLong has put it, "that their organizations are in compliance, not that they are out of compliance but that the agency probably will not treat the matter seriously." Our legal system denies them that chance, and its denial is effectively deliberate. As programmers might put it: It's not a bug, it's a feature. The ACLU, campaigning to overturn the employment-at-will principle, has called for the content of good cause in dismissal *not* to be specified in legislation, but to be left up to shifting judicial discretion. Sexual-harassment-law advocates have consistently preferred keeping the law "fluid," keeping employers guessing as to what is permitted, to codifying by statute what is required. ADA advocates successfully fought off any set definition, however high, on how much "reasonable accommodation" would be enough.

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If we gave employers any definite safe harbor, after all, some of them might reach it. And then, for advocates and lawyers and enforcement agencies, a train of unwelcome consequences would follow. They might feel their moral high ground beginning to slip away, along with the practical leverage—in the form of threats to call down the law—that goes with it. It would not be so easy to depict the enemy as a bunch of scofflaws or to list the unmet promises, stretching out unending to the horizon, on which the existing law has still not delivered. The rest of us might cease feeling guilty and turn our attention to other deserving issues, causes, and groups, and even the most burningly felt need of identity politics might recede to the status of just one more private dispute among many, rather than a legal right being denied.

Many a hands-on manager has been tempted to cry out to the heavens in frustration: Do they really expect us to comply with all these laws? To which the appropriate answer is a question in turn: Whatever made you think they did? ◆

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Malignant Law Enforcement

JOE LONG

Mary Michaels is pleased to tell me that her 16-year-old son, Paul, is in front of their house in Troy, Michigan, washing the car. More pleased than you might imagine. Nearly a dozen years ago, the 4-year-old Paul was diagnosed with an astrocytoma, the most common type of brain tumor. The prognosis was grim. Doctors warned that the tumor was too entwined in Paul's brain and optic nerve for debulking surgery—where doctors saw through the skull and physically remove the cancer—to do any good.

More bad news followed. Radiation and chemotherapy are the main weapons of mass destruction in the cancer doctor's arsenal. But they've got their own problems. Chemotherapy powerful enough to annihilate Paul's tumor would probably kill him too. The radiation would likely blind him, stunt his growth, and make him incessantly nauseated, and in the end might not give him much more time.

"We started thinking, 'Why would we do this?'" Mary says. "It would be torturing Paul. But the doctors' attitude was, 'You have to treat it somehow.'" So the Michaelses turned to the grab bag of alternative cancer treatments popular among those mistrustful of standard medicine: "We became macrobiotic. The tumor grew. We went to Mexico for Laetrile. The tumor still grew. As crushed as you are coping with a malignant, inoperable tumor, it takes a lot for hope to die."

Then Mary saw an episode of the *Sally Jesse Raphael* show about a Polish-born cancer doctor named Stanislaw Burzynski. Some of Burzynski's patients had suffered from astrocytomas that apparently had been cured by his unorthodox treatment. "The people on the show were so healthy-looking," Mary recalls. "I couldn't believe they were cancer patients." By that time, doctors at the prestigious Mayo Clinic had given Paul a definite death sentence. He had the largest brain tumor they'd seen in anyone that age, they said, larger than an egg. In a last-ditch effort, Mary sent Dr. Burzynski her son's scans and medical history. Burzynski thought he might be able to help.

That was more than a decade ago. Whether Burzynski in fact helped Paul remains an open question. But after years of treatment with Burzynski's patented substances, antineoplastons, Paul is 16. Back in the early years of his cancer, every doctor assured Mary that Paul wouldn't make it past the age of 10. The egg-sized tumor is now pea-sized, and, unlike heavy users of chemotherapy and radiation, Paul is neurologically normal and healthy in every way. The cancer, for now, seems under control. (Tumors are often known to return with a vengeance after seeming remission, however.) The biggest danger now to Paul's continued life and health, his mother says, is the U.S. Food and Drug Administration.

The FDA has a long-standing dispute with Stanislaw Burzynski that has embroiled both parties in legal maneuvers for 14 years and earned the agency the ire of Burzynski's patients. As Paul Michaels is wont to tell the press, echoing many other patients, "The government is trying to take away the only weapon I have against cancer." In the struggle for the hearts and minds of politicians and journalists, Burzynski and his patients are at least holding their own. Rep. Joe Barton (R-Tex.), chairman of the House Subcommittee on Oversight and Investigations, has led sympathetic congressional hearings. While the print press tends to be skeptical, Burzynski has been presented in a mostly positive light on TV shows ranging from *Hard Copy*

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INFO-LINE
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JUROR IN THIS CASE
WOULDN'T YOU WANT
TO HEAR THE TRUTH?
HOPE
F D A -- If you take away my treatment -- You take away my life --
Dr. B is my son's only chance at life. Don't take that chance from him.

Dr. Stanislaw Burzynski (at podium) surrounded by supporters outside a Houston courthouse.

to CBS's *48 Hours* and ABC's *Nightline.*

Depending on your point of view, the FDA officials battling Burzynski are mindless bureaucrats blocking access to a promising new therapy or dedicated public servants trying to prevent a quack from taking advantage of desperate patients. The truth probably lies somewhere in between. On the one hand, the government has been hard pressed to cite any serious danger from allowing Burzynski to continue treating patients with antineoplastons. On the other hand, despite numerous dramatic anecdotes and testimonials, the effectiveness of Burzynski's approach has yet to be demonstrated. Whatever the merits of antineoplastons, Burzynski's dispute with the FDA starkly poses the question of who should get to weigh the costs and benefits of experimental treatments: the patients whose lives are at stake or regulators acting on their behalf.

Ever since the late 1970s, when Burzynski was a researcher at Baylor College of Medicine in Houston and just beginning to work out his theories on antineoplastons, the FDA has been skeptical of this foreign doctor who dared suggest he had discovered something that might—sometimes, under some circumstances—be a cure for cancer. The FDA has protocols for bringing new drugs to market, and Burzynski has a long history of flouting them. He left Baylor in 1977 amid controversy over antineoplastons—amino acid chains that he believes can communicate "switching off" signals to multiplying cancer cells. Without jumping through the FDA's hoops, Burzynski began treating patients with the substances. He originally extracted his antineoplastons from human urine—a point that has proven priceless for those seeking to cast Burzynski and his drugs in an uncharitable light—but now synthesizes them in a lab.

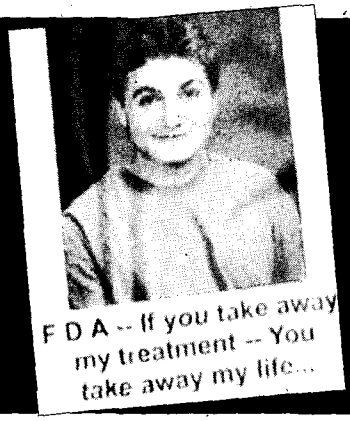
Burzynski gives me a rough explanation of his theory by telephone during a day off from the latest battlefield of his war with the FDA: a federal courtroom in Houston where he faces up to 290 years in prison for allegedly violating FDA regulations concerning experimental drugs and misinforming insurance companies about the nature of his therapy. "The theory is that cancer is a disease of information processing," he says. "The cancer cells are mistakenly programmed to multiply all the time. There are various switches where you can turn them off, that define 'to be or not to be' for cancer cells. All the antineoplastons do is turn off that switch. But different cancers

The FDA's war against an unorthodox cancer doctor

By Brian Doherty

are caused by different oncogenes. Our switches seem to work on two different genes, and we can't help everyone."

The conflict between the FDA and Burzynski is complicated by the fact that both sides are now sleeping with the enemy. Even as Burzynski fights to stay out of prison for breaking the agency's rules, the FDA has approved and is supervising a set of Phase II clinical trials to test the value of antineoplastons. (Technically, the FDA does not supervise clinical trials, as they will tell you. In practice, however, anyone who wants the approval of the new drug application at the end of the trials will take the advice and obey the whims of the FDA, says former FDA Chief Counsel Peter Barton Hutt.) As a result, Burzynski might get the equivalent of a life sentence for technical violations of FDA regulations, while simultaneously being hailed for discovering a powerful cancer-fighting tool.



Even as Burzynski fights to stay out of prison for breaking the agency's rules, the FDA has approved and is supervising clinical trials to test the value of his treatment. As a result, Burzynski might get the equivalent of a life sentence for violations of FDA regulations, while simultaneously being hailed for discovering a powerful cancer-fighting tool.

The FDA first tried to stop Burzynski from treating patients with antineoplastons in 1983, when it filed a lawsuit against him in federal court. U.S. District Judge Gabrielle McDonald ruled that, while interstate trafficking in the unapproved drugs would have to stop, Burzynski could still treat patients in Texas without FDA interference. During that case, the government side made a motion for summary judgment, which read in part: "If the court declines to grant this injunctive relief sought by the government, thus permitting continued manufacture and distribution of antineoplastons, the government would then be obliged to pursue other less efficient remedies, such as actions for seizure and condemnation of the drugs or criminal prosecution of individuals....This court would then be faced with ordering the government not to undertake such enforcement actions, if the court truly desired to allow the continued manufacture and distribution of the drugs."

The government has followed through on that threat, illustrating a tendency cited by former FDA Chief Counsel Hutt: "When the FDA loses a case, it has a mind like an elephant.... Once the FDA makes a collective decision, trying to make it let go is almost impossible. These are 'FDA crusades.' In a real sense, they're vendettas." (See "Clinical Trials," May 1995.)

In 1985, the FDA got a search warrant for Burzynski's office, based on the suspicion that he was violating the ban on interstate distribution of antineoplastons. Agents confiscated thousands of patient records. FDA officials allowed Burzynski access to the records only at their convenience and forced him to photocopy them before leaving the agency's Houston office. Burzynski, various patients, and several of his associates were called up before three different grand juries from 1985 to 1994. No indictment followed.

These repeated attempts to incriminate Burzynski led Rep. Barton to send an angry letter to Attorney General Janet Reno in September 1995. "It would appear," he wrote, "that the FDA and the Justice Department are abusing the grand jury process to harass and punish Dr. Burzynski for persuading a federal judge that he is not violating the law by practicing medicine within the State of Texas." Barton asked for all the documentation regarding the government's fight against Burzynski. With political pressure on the FDA regarding more than a decade of harassment with no criminal indictment, in November 1995 a fourth grand jury finally gave the government what it wanted: a 75-count indictment against Burzynski, which led to the trial in Houston.

The government tried to prove that Burzynski treated out-of-state patients with antineoplastons, in violation of Judge McDonald's order. It also alleged that he committed mail fraud against insurance companies by not informing them about the experimental nature of the work for which he was charging them. Most of the patients I interviewed said their insurance companies didn't pay for antineoplaston treatments anyway. Burzynski has been in court many times in civil suits with insurance companies over payment for his treatment. He's won some and lost some.

During the criminal trial, a postal inspector testified that she followed one of Burzynski's employees to a shipping store, where he tried to send a package containing antineoplastons to an out-of-state patient. The employee swears he did this on his own time and without Burzynski's knowledge, out of compassion for the patient. The son of an elderly Burzynski patient testified about harassing and frightening visits from FDA agents, who told them Burzynski was a fraud.

Burzynski's lawyers weren't allowed to present any evidence regarding the possible efficacy of antineoplastons. That's because the government's case has nothing to do with whether the drugs save lives, whether Burzynski's treatment is medicine or quackery. Whatever antineoplastons are, they aren't FDA-approved. Yet the agency saw enough promise in Burzynski's approach to authorize clinical trials. The act for which Burzynski might spend the rest of his life in prison—shipping antineoplastons across state lines—he is now doing openly and gleefully, because the FDA has told him it's OK in the context of the clinical trials.

Another apparent sign of flexibility came in March 1996, when the Clinton administration announced plans to speed up the approval process for cancer drugs whose tumor-shrinking potential has been demonstrated. Clinton vowed that "dozens of [new cancer drugs] will get to the market sooner." Secretary

of Health and Human Services Donna Shalala swore the new system would go into effect immediately. *The Dallas Morning News* reported that, under the new rules, "all a company has to show is that the drug can measurably shrink the size of a tumor, even for only a short time," and speculated that the reform might affect Burzynski's case.

Burzynski thinks the preliminary results of the clinical trials already satisfy the tumor-shrinking requirement. But when he petitioned the FDA in September for approval under the new guidelines, the agency wrote back that "[t]he Cancer Initiatives announced in March of this year by President Clinton and Vice President Gore did not set aside any laws or regulations related to approval of new drugs for cancer treatment....We have not changed or lowered our standards for the approval of such drugs." Which makes you wonder what the point of the March 1996 announcement was, aside from making Clinton seem compassionate.

All that Burzynski's patients—and potential patients—care about, of course, is whether antineoplastons work, not whether the FDA has approved them. But according to Assistant U.S. Attorney Mike Clark, who is prosecuting Burzynski, even raising that issue would be "irrelevant, emotional, prejudicial, and misleading." From the government's perspective, that's undoubtedly true. But for someone who wants or needs an unapproved treatment, the FDA's devotion to regulations is the real crime.

Young Paul Michaels is not Burzynski's only success story. There are dozens more among the 2,500 or so patients he has treated, all telling similar stories of cancer diagnoses, medical death sentences, and desperate searches in the realm of alternative therapies that ended in Burzynski's healing arms. Their dedication to Burzynski, whom they call "Dr. B," is such that they've formed a pressure group to lobby on his behalf. The Burzynski Patient Group is run by Steve Siegel, the head of a Los Angeles-area marketing company and the husband of patient Mary Jo Siegel. "We've become another pain in the ass to the FDA—we're like a new AIDS lobby," he says with a proud laugh. Siegel and his wife spend 100 hours a week running the Burzynski Patient Group, answering questions, referring people to other patients, lobbying Congress and the FDA. Through the efforts of the group, Barton held a series of congressional hearings from August 1995 to February 1996 to discuss Burzynski's treatment and the FDA's treatment of Burzynski.

A series of patients and their relatives appeared before Barton's subcommittee. Some said Burzynski's treatment saved them or their loved ones. (One patient who testified about the wonders of Burzynski's treatment, Doug Wagner, has since died.) Some witnesses acknowledged that antineoplastons didn't keep their relatives alive but said Burzynski should be allowed to continue his research and treatment anyway.

One subcommittee staffer who works on the Burzynski matter wonders aloud about the FDA's goals in this case. Three grand juries without an indictment, he says, is "unheard of. Ask any career federal prosecutor with no dog in this fight, and you'll learn it's extremely unusual to have a succession of grand juries without an indictment being issued. Grand juries will generally indict a ham sandwich if a prosecutor asks them to. The underlying charges are not that complicated. The drug's not approved—was the doctor distributing it? It shouldn't take 10 years to get an indictment. We still don't really know why it is that the federal government and the U.S. Attorney's Office in Houston—a large city with lots of federal criminal issues—are spending all this time going after Burzynski, what there is about this case that merits this kind of devotion of resources, when there doesn't seem to be any compelling evidence of a threat to public health. We asked the FDA when [Administrator David] Kessler testified before Barton's committee: Where's the harm? Where are injured people?"

Kessler didn't have the answer. He referred Barton to Robert Spiller—who, as the FDA's lawyer in the 1983 case, had vowed vengeance against Burzynski more than a decade earlier. Spiller related the tale of two patients he had read about in a report from the Canadian government. Both had died of a blood infection from the subclavian catheters through which some patients administer their antineoplastons. (For lower dosages, the drugs are taken in pills.) "That has nothing to do with antineoplastons per se, just the way they were administered," the subcommittee staffer observes. "That could happen with any kind of medicine administered through intravenous catheters."

Congressional pressure, the staffer maintains, pushed the FDA into allowing all of Burzynski's previous patients to be treated in the ongoing clinical trials, even if they didn't meet the usual criteria for participating in such research. "The subcommittee broke the logjam," he says. "Burzynski is getting farther along in the approval process. We'll soon have data on hundreds of patients under many different protocols. People want to know if this stuff works, if this is a breakthrough, or if Burzynski has nothing and is just stealing people's money. But with no accomplishments, there would be no following. If he's a con man, where [are] the victims? I've gotten a few complaints from disgruntled relatives, but I can count them on one hand. And none of them would talk to me face to face so I could question them. Even where it doesn't prove ultimately successful and the patient dies, I have relatives telling me they still swear by the guy, and their mom loved him, and they think she got some time she wouldn't otherwise have had and at least wasn't made sicker by the treatment."

The FDA isn't Burzynski's only enemy. The Texas Board of Medical Examiners has also been fighting him for years. "There's always something new going on with Burzynski," says Tony Cobos, the board's general counsel, when I ask him to sum up the story of Burzynski's troubles with state regulators. He suggests I order the relevant pile of documents. Nearly 100 pages arrive, chronicling how the medical board snatched victory from the jaws of defeat in their struggle to divest the doctor of his license. First an administrative law judge decided that all Burzynski had to do was change some of his advertising. Then the board decided to revoke Burzynski's license despite the judge's decision. The case entered the courts, where a district judge reinstated Burzynski's license and an appeals court reversed that

decision, upholding the license suspension. The issue is now awaiting possible consideration by the Texas Supreme Court.

How the board got on Burzynski's case isn't clear. "Our investigative files are confidential," Cobos says. "We don't say if people filed a complaint or where it came from. But obviously a complaint was filed." Burzynski does have some unsatisfied customers. Take Andy Cayon, a patient from Connecticut who started out as a Burzynski booster but, after six months of treatment and no apparent shrinkage of his brain tumor, now complains that the doctor's office won't even take his phone calls. Whether antineoplastons are worth a damn is still an open question; that they are not a miracle cure-all is clear to everyone, even Burzynski.

Burzynski's man in charge of managing the bureaucratic end of the clinical trials, Dean Mouscher, acknowledges that up to one-fourth of the brain cancer patients in the study so far are showing no response at all. Of course, conventional cancer treatments can't promise miracles all the time either—and often have horrific side effects to boot. The worst any user of antineoplastons can tell me about them is that they made him very thirsty all the time. In fact, the FDA let Burzynski skip Phase I of the clinical trials for antineoplastons—the test for toxicity—because there was already ample evidence of long-term safety.

Whether or not antineoplastons work, Burzynski makes it clear that he offers no guarantees. All patients sign a consent form which states that antineoplastons are "purely experimental" and that "the use of such substances as a prescriptive drug has not yet been approved by any State or Federal regulatory agency, nor has its use been approved or adopted by any single or group of Medical Institutions at this time." The form also says that "[n]either [Burzynski] nor anyone associated with him is permitted to ship his medication out of the state. Transportation of Antineoplastons out of the state of Texas by a patient or his or her agent could be viewed as a violation of the federal Food and Drug Laws....No assurances have been made to the PATIENT by anyone as to any results expected to be obtained from such treatment....[N]either success nor improvement in PATIENT's condition is warranted or guaranteed by such treatment. PATIENT understands that the reverse may be true and that PATIENT's condition may worsen as a result of the treatment....Dr. Burzynski makes no claims that Antineoplaston drugs will cure or stabilize cancer....[T]he U.S. Food and Drug Administration and the National Cancer Institute claim that this drug is not yet proven to be effective in the treatment of cancer."

The default assumption when someone jumps up claiming to have cured otherwise incurable diseases is: The guy must be a quack. Is Burzynski? The sort of rough empiricism most of us use in making these judgments (how many of us have done, or carefully studied the results of, double-blind, long-term studies of health claims on which we hold opinions?) gives evidence for both sides.

Despite all his FDA troubles, Burzynski hasn't set up shop in Mexico, where desperate patients in search of alternative treatment already go for such supposed cancer cures as Laetrile. There, he could charge whatever he wanted, with no hassles from the authorities. And though he seems to be making a tidy living at his practice, Burzynski doesn't make wild promises to every patient who comes his way. He readily admits that there are certain cancers for which his treatment just doesn't seem to work. Mary Jo Siegel—who is now in total remission from a low-grade non-Hodgkin's lymphoma, a recovery for which she credits antineoplastons—learned about Burzynski from a fellow cancer support group member with ovarian cancer, who had gone to Burzynski for help but was turned away. Burzynski told her he'd had little luck with ovarian cancers.

Nor is Burzynski's treatment approach utterly implausible. In addition to radiation and chemotherapy, the National Cancer Institute recognizes "biological treatment" for cancer, which "uses materials made by your body or made in a laboratory to boost, direct, or restore your body's natural defenses against disease." In the 1980s, NCI scientists were interested enough in antineoplastons to check out some of Burzynski's best cases, and they were impressed enough by what they saw to begin trials, which ended inconclusively after Burzynski disapproved of their methods. The NCI shifted from a protocol on which both parties had agreed, Burzynski says, and began including patients whose tumors were too big and had spread too far for the doses of antineoplastons used. But NCI researcher Nicholas Patronas, a member of the team that looked into Burzynski's treatment, nevertheless testified during the Texas medical board hearings that the results he saw were "amazing." Antineoplastons seemed to have eliminated at least five patients' brain tumors, he said, and "they are not handicapped from the side effects," whereas "side effects of the most aggressive previous treatments are worse than the tumor itself....I think it is impressive and unbelievable."

The NCI is even now studying a substance called phenylacetate, chemically similar to antineoplastons but not patented by Burzynski. One scientist who has worked with the NCI and the National Institutes of Health says he has done enough *in vitro* work to feel confident that Burzynski is on to something—that it is the particular combinations of amino acid chains in the antineoplaston treatment that work, much better than phenylacetate alone. Yet he insists that higher-ups in the NIH had no interest in pursuing this work because of animus against Burzynski, or at least because of the unsavory reputation his ongoing FDA fights have given him.

Several factors have made it hard for Burzynski to improve his reputation. He has a disturbing tendency to compare himself to Galileo and Pasteur, in classic quack style. He and his supporters tend to blame huge, vague, overarching conspiracies on the part of the establishment for his troubles. Because he has patented the antineoplaston formulas, Burzynski stands to profit even more handsomely than he has so far if the drugs pan out in clinical tests. He makes sweeping statements about the potential of antineoplastons, not only for treating various types of cancer but for curing ailments such as AIDS, lupus, multiple sclerosis, arthritis, and skin diseases—all of which he attributes, like cancer, to information processing failures.

Burzynski's public relations apparatus also engages in some questionable practices, such as circulating a letter, supposedly from the chairman of the Department of Neurosurgery at the University of Texas M.D. Anderson Cancer Center, recommend-

ing antineoplastons for a prominent Houston TV news anchor. The doctor is adamant that he never signed or approved the letter, which he says his secretary wrote at the patient's insistence. Finally, while it probably shouldn't be held against him, Burzynski's Polish-inflected speaking voice is eerily reminiscent of Dr. Nick Riviera, the recurring quack-for-all-seasons on *The Simpsons.*

In the end, none of this should be relevant. However disreputable Burzynski may seem, however much money he's making, the scientific issue of whether his treatment works still has to be resolved. By the same token, the anecdotes and testimonials from his patients do not count as proof. Most of Burzynski's patients see other doctors in their hometowns. Mary Jo Siegel is a patient of Dr. Peter Rosen at UCLA, who remains resolutely unimpressed by her remission. Spontaneous remissions, however rare, *do* happen, and he thinks that they explain Burzynski's apparent successes.

Dr. Carl Ott of the Memorial Clinic in Olympia, Washington—another doctor with a brain tumor patient, Richard Gribben, who has improved under antineoplaston therapy—still doesn't recommend it to patients generally, mostly because "people don't often come to me for advice on unconventional therapy. If [Gribben] had any real hope with conventional therapy, I would have tried hard to talk him out of [using an-tineoplastons]. Our oncologist on staff thinks Burzynski is a quack preying on the desperate. When he saw the results [with Gribben], he just kind of shrugged his shoulders." Might Gribben have undergone a spontaneous remission? "I've been in practice 10 years," says Ott. "I see 10 people a year with similar problems, and I've never seen a spontaneous remission comparable to this. Some do better than others, but I've never seen advanced tumors disappear spontaneously like this. I hope they don't shut Burzynski down. He's been remarkably effective and nontoxic for my patient."

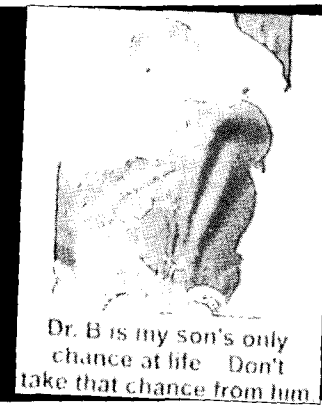
But if Burzynski is imprisoned, the research will come to an end. Steve Siegel asked U.S. Attorney Mike Clark whether the government had a contingency plan for the patients should Burzynski go to prison. "He said, 'That's not my responsibility,' " Siegel recalls. "He would assume that responsibility is with the FDA. But the Patient Group had a meeting with the FDA in early December. They said it wasn't their responsibility if the clinic closes down, either." Says Burzynski, almost nonchalantly, "If I am in prison, this whole thing would collapse and people will die."

Burzynski isn't going to prison—yet, anyway. Just before press time, the jury in his Houston trial announced that they couldn't reach a verdict. Six jurors wanted to acquit and five wanted to convict on all 75 counts. One juror was undecided. The judge then dismissed the charges of insurance fraud. U.S. Attorney Clark vowed to bring Burzynski to trial again in May on the FDA-related charges.

Burzynski's satisfied patients and would-be patients don't care whether he has dotted all his *i*s to please FDA bureaucrats. They are sick; they are dying; in most cases, they've been told by a bevy of the best conventional doctors that they are as good as dead. (The path to Burzynski, for the patients I talked to, wound its way first through places like Stanford, UCLA, the Mayo Clinic, and the Dana Farber Cancer Center.) What possible harm, they wonder, is the FDA trying to prevent by keeping us from taking the substances we want, that we think give us some hope?

The FDA is not completely deaf to such appeals. Washington, D.C., lawyer Jonathan Emord represents patients petitioning the FDA's Center for Drug Evaluation and Research for "compassionate use" exceptions or slots in the clinical trials. Sometimes he succeeds; sometimes he fails. Emord is eagerly awaiting the Supreme Court's response to last year's rulings by two circuit courts declaring a right to die in certain circumstances. If upheld, those decisions could open the door to new arguments about the right of dying patients to take any treatment they choose.

"We still don't really know why it is that the federal government and the U.S. Attorney's Office in Houston are spending all this time going after Burzynski when there doesn't seem to be any compelling evidence of a threat to public health," says a congressional staffer working on the case. "Where's the harm?"



When faced with a face, a name, a case, a specific impending death, the FDA often is capable of bureaucratic mercy. But patients wonder: Why must they make it so hard? Why must we come before them as supplicants? Why not just let us pay our money and take our chances?

"Sure, there's the safety valve of the compassionate use exception," says the congressional staffer who works on the Burzynski case. "And the agency has told me off the record that they've approved 90 percent of compassionate use requests from Burzynski. But what about the 10 percent? I knew one 67-year-old man with prostate cancer and a heart condition. The FDA at first refused him, saying surgery could still work for him. The man didn't want surgery. He was afraid of dying on the table because of his heart condition. The patient didn't consider surgery a viable option for himself—but the FDA did. He eventually got his way, because the FDA wondered if they could defend this decision before Congress.

"That's a hell of a way to make decisions for terminally ill people."

Brian Doherty (bmdoherty@aol.com) is assistant editor of REASON.

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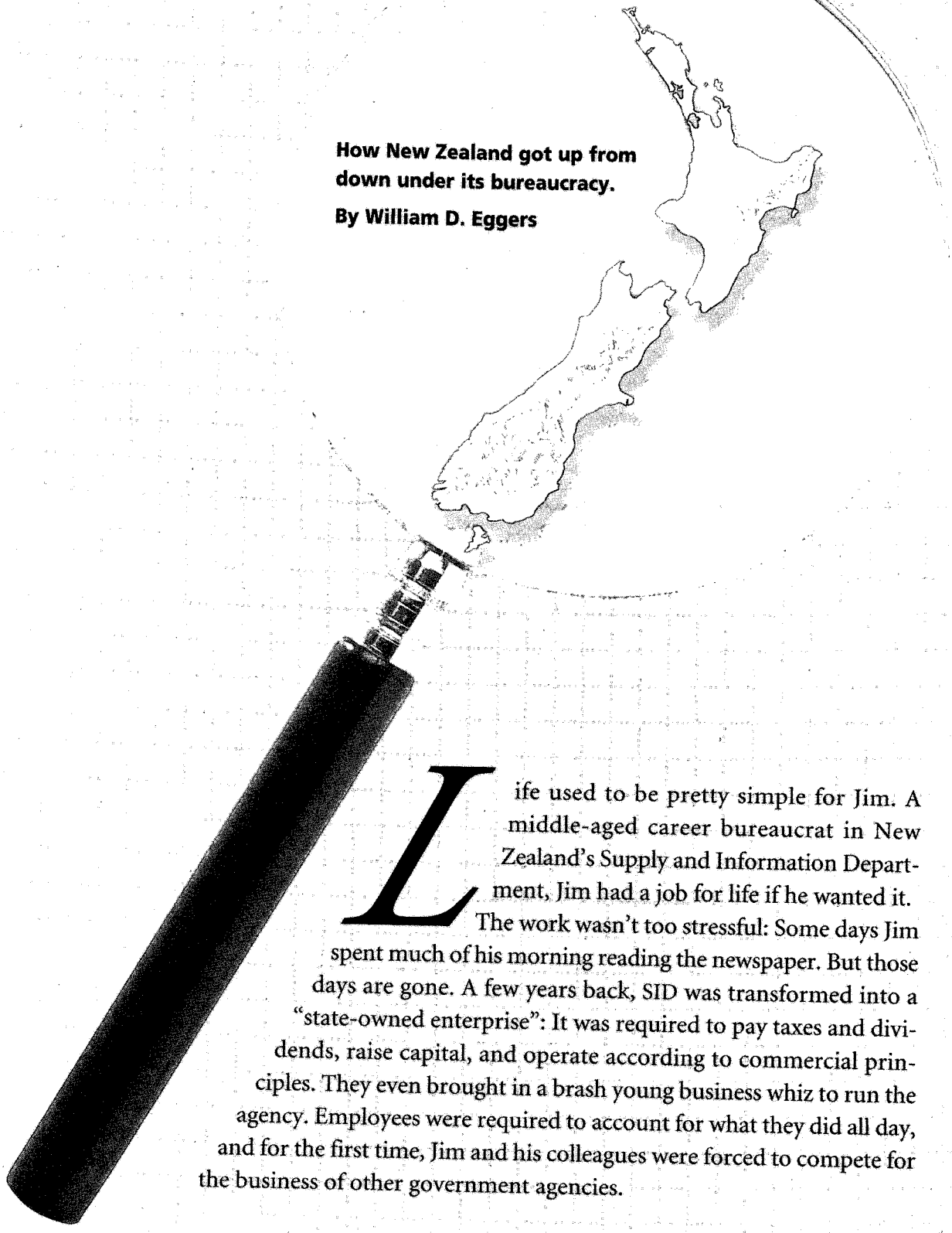
The Incredible Shrinking State

How New Zealand got up from down under its bureaucracy.

By William D. Eggers



Life used to be pretty simple for Jim. A middle-aged career bureaucrat in New Zealand's Supply and Information Department, Jim had a job for life if he wanted it. The work wasn't too stressful: Some days Jim spent much of his morning reading the newspaper. But those days are gone. A few years back, SID was transformed into a "state-owned enterprise": It was required to pay taxes and dividends, raise capital, and operate according to commercial principles. They even brought in a brash young business whiz to run the agency. Employees were required to account for what they did all day, and for the first time, Jim and his colleagues were forced to compete for the business of other government agencies.

Jim has been a loyal—if not too industrious—state servant all his adult life, and now he's angry and bewildered at the changes that have occurred in New Zealand since the mid-1980s. "In the old days, the PSA [the public sector employees' union] would never have let them get away with it," says Jim sadly.

SID was recently privatized—sold to a Japanese company, making Jim a private sector employee for the first time in his life. "Public service is supposed to be for life," he says. "That was the deal when I got in; now they're going back on it." Indeed, Jim and many of his co-workers would soon become "redundant," polite New Zealandese for being laid off.

Sound like fiction? It is. The story of Jim and SID's transformation is a synopsis of *Market Forces*, one of New Zealand's hottest plays. The changes transforming New Zealand government, however, are quite real. You know a country has gotten *really* serious about downsizing the state when one of its most popular plays is about privatization.

Since 1984, New Zealand has outdistanced every other country in reducing government's size and streamlining its operations. In that time, two successive New Zealand governments—the first led by the formerly socialist Labour Party and the second by the nominally conservative National Party—carried out a massive program of deregulation, downsizing, and privatization that makes Thatchernomics seem plodding.

Since launching its reform program in 1984, New Zealand, a nation of only 3.5 million people, has outdistanced every other country in reducing government's size and streamlining its operations. In that time, two successive New Zealand governments—the first led by the formerly socialist Labour Party and the second by the nominally conservative National Party—carried out a massive program of deregulation, downsizing, and privatization that makes Thatchernomics seem plodding.

Markets for a variety of goods and services that were once highly controlled—financial, housing, energy, airlines, trucking—were opened to competition. All farm and business subsidies were eliminated. Import quotas were removed. Tariffs were dramatically reduced. Immigration was liberalized. All controls on prices, wages, dividends, and foreign exchange were lifted, and the labor market was deregulated to an extent not seen anywhere else in the Western industrialized world. The sale of more than two dozen state enterprises brought in NZ$14 billion (about US$9.7 billion) in revenue—about 19 percent of New Zealand's GDP. An equivalent asset sale program in the United States would realize over $1 trillion in revenue.

By the time the downsizers were finished, the island nation's tax and spending levels had fallen from 41 percent to 35 percent of the economy. New Zealand has gone from being one of the most protected and socialized industrialized economies outside the Soviet bloc to the third highest ranking in The Fraser Institute's Index of Economic Freedom survey (one place ahead of the United States). In the wake of disappointments—and some serious strategic errors—following America's 1994 Republican "revolution," the New Zealand experience offers powerful lessons in cutting back the state.

Expert Opinion?

If you had asked experts in the early 1980s whether a reform program like New Zealand's would be politically possible in a Western, multiparty democracy, the answer from most of them would have been a resounding *no*. A rich and distinguished body of political science literature—much of it written by academic critics of big government—insists that such a program is all but impossible.

Economist Mancur Olson's classic text, *The Rise and Decline of Nations*, advances the theory that as societies mature, ever more—and more powerful—interest groups emerge. Their main trade: lobbying the state for greater collective action on their behalf. Once these groups develop, they rarely disappear.

Jonathan Rauch has labeled this phenomenon "demosclerosis." Writing in REASON, Rauch argued that one consequence of demosclerosis is that it is all but impossible to downsize—or even reform—government. "Between comprehensive disaffection with government and comprehensive reform of government lies a vast chasm and no bridge," he writes. "The public despises government and it desires reform...yet there appears, at least at present, to be no path from here to there." (See "Eternal Life," August/September 1996.) Rauch's conclusion: The federal behemoth is here to stay—permanently.

Furthermore, Nobel laureate James Buchanan, the father of the public choice school of economics, contends that all human behavior—that of politicians and bureaucrats included—is dominated by self-interest. The result: Those in government will pursue their own self-interest at the expense of taxpayers, and bureaucrats will try to maximize their budgets by "capturing" the policy making process. Both usually succeed; government grows bigger, and bureaucracy becomes more entrenched.

But even if government cannot be made substantially smaller, can't business management practices be introduced? Yes, answers James Q. Wilson, the UCLA political scientist, but to minimal lasting effect. In his book *Bureaucracy*, Wilson argues that while it may be possible to introduce business ideas into government, sustaining them *over time* is all but futile. Politics always creeps back in. Writes Wilson, "Public management is not an arena in which to find Big Answers; it is a world of settled institutions designed to allow imperfect people to use flawed procedures to cope with insoluble problems."

Though history has generally borne out the observations of these thinkers, every now and then an opportunity comes along to reverse dramatically the growth of the state and to make radical changes in the machinery of government. In 1984, New Zealand's band of reformers seized their opportunity and eventually overcame the traditional barriers to cutting back the state. The question is, How did the Kiwis do it?

A Harmonic Convergence

First, New Zealand's revolutionaries were able to take advantage of their political system: a unicameral legislature, a professionalized and nonpartisan civil service, and no written constitution. This structure allowed the party in power to do pretty much whatever it wanted.

Second, there is nothing like a good crisis to force change, and the Labour government in 1984 confronted a dire crisis from the day it took office. The currency was devalued, the budget was bleeding red ink, inflation was out of control, and interest rates were at 20 percent. The business community had lost faith in the government, and the public was ready for strong medicine.

But New Zealand's transformation cannot be properly understood without understanding the people who made it happen. Perhaps no two people were more instrumental than Roger Douglas, the Labour government's finance minister (from whom "Rogernomics" was to take its name), and Ruth Richardson, the finance minister when the National Party took back power in 1991. Their vision, persistence, stubbornness, and drive were indispensable in bringing about reform.

In the late 1970s and early '80s, while most of New Zealand's Labour Party was preoccupied with left-wing social and cultural issues (remember their anti-nuke policy?), Douglas, a businessman from a political family, was left alone to fashion much of Labour's economic policies. When Labour took office in 1984, he had brought a number of key party leaders around to his market-oriented views.

At the time, New Zealand looked remarkably similar to the interest-group-dominated state described by Mancur Olson. "New Zealand had been the acme of a lobbying, rent-seeking society," remembers Roger Kerr, the director of the New Zealand Business Roundtable. "If you look in Olson's book, you see two or three pages on New Zealand. The country conformed precisely with his hypothesis."

While recognizing the power of interest groups to block reform, Douglas didn't believe their existence necessitated compromise or retreat. Instead he designed strategies to buy out or overwhelm interest group opposition. One tactic was to apply the reforms on a broad front in order to spread the burden and enhance the legitimacy of the program.

Soon after taking office, for example, Labour eliminated farming subsidies and reduced agricultural tariffs—an extremely controversial policy considering that 44 percent of the average sheep farmer's income came from government subsidies. When Kiwi farmers staged huge demonstrations—including killing sheep in the streets—Douglas didn't waver. Instead he used their anger as ammunition to push reforms further.

Farmers started agitating for the removal of privileges and subsidies for other favored groups. They also backed reduced public sector spending (to reduce pressure on real interest rates), and privatization of the horribly inefficient state-run railways and ports (to allow the farmers to lower their input costs and better compete in the marketplace). "We had a very deliberate strategy of directing interest group fire away from us toward other interest groups," recalls one of Douglas's cabinet colleagues. "When interest groups would complain to us that 'those fellows down the road ought to have their privileges removed also,' we encouraged them to go public."

Responding to pressure from the farmers, the ports and railways were privatized. The result: Freight costs plunged 50 percent and shipping freight rates fell 25 percent. Due in part to these lower input costs—and to increased international competition—New Zealand's farmers are now among the most competitive in the world.

Business took a big hit along with other interest groups (in marked contrast to the last GOP budget). Subsidies and export incentives were eliminated, import protections were removed, and protected markets were opened up. While many firms were wiped out in the process, it was a question of fairness, says Douglas: "You need to do it across the board to demonstrate that everyone is being treated equally."

Roger Douglas: The Labour finance minister designed strategies to buy out or overwhelm his opposition. One tactic was to apply the reforms on a broad front in order to spread the burden and enhance the legitimacy of the program: "You need to do it across the board to demonstrate that everyone is being treated equally."

Douglas had the perfect salesman to sell the sometimes painful reforms: Prime Minister David Lange. An immensely popular, charming, and humorous politician, Lange put a soothing, smiling face on the reform program (something the GOP Congress has also sorely lacked). Trusted by the public, Lange's solid social democratic credentials made it difficult for opponents to condemn the reforms as heartless and right-wing.

Douglas was eventually forced out of office in 1988 when he began agitating for more radical reforms than the Labour Party—which by then was having major problems with its left wing—could

stomach. It would be several years before another individual would come along with the will and the clout to continue the New Zealand transformation.

Lady Rottweiler

From the moment you encounter her firm handshake and throaty "how do you do," it is clear that Ruth Richardson is determined. Barely over five feet tall, Richardson seems an unlikely revolutionary. When she became the shadow finance minister of the National Party, party strategists called in make-over consultants to try to tone her down—both her looks (by her own admission she was prone to wearing "fruit salad" dresses and hadn't quite discovered make-up) and her take-no-prisoners rhetoric. Considering her too hard-line and dogmatic, critics likened her to a Rottweiler.

Richardson is a true believer—"I'm moved by conviction, the supremacy of the individual, more than anything else," she says—unwavering in her advocacy of free market policies. She practices the Margaret Thatcher brand of politics: You are either with her or against her. There is no middle ground.

So that opponents would have no time to mobilize, the National Party—which Richardson had to bring kicking and screaming around to her free market policies—quickly pushed through an ambitious and controversial agenda upon taking back power in December 1990. Within months, the new government had cut social welfare spending deeply (though the country still has a fairly generous social welfare apparatus), reduced expenditures across government, and pushed through the Employment Contracts Act, its radical plan to deregulate the labor market.

Taking Labour's cue, many of the measures were bundled together, under the reasoning that a coherent package helps people understand the links between the different policy changes. "Bundling" was also considered good politics. "If you are bound to raise a storm anyway, you might as well put as many controversial measures together as possible," explains Richardson in her book *Making a Difference.* "The most controversial tend to drown out the less controversial."

While Douglas and Richardson are very different in temperament and style, they shared one important characteristic: an absolute conviction that what they were doing was necessary and morally right. "A key ingredient to what happened here is you had key people who weren't all that interested in being returned to public office," explains Jonathon Boston, a senior lecturer at Victoria University in Wellington. "I don't think Roger Douglas was concerned whether or not he lost his seat. He saw it as his responsibility to do what was right for the country irrespective of being returned to office, and if necessary to take his party down with him. Ruth Richardson was from exactly the same tradition."

Ultimately both Douglas and Richardson paid a personal price for their courage: They were both asked to relinquish their positions when their respective governments' popularity declined. But there are no regrets. When asked what she would have done differently, Richardson answers defiantly, "I would have moved further and faster."

Treasury brought an intellectually rigorous approach to reforms that had no parallel in the Reagan or Thatcher administrations. "It became a 'think tank' for the [classical] liberal movement," writes political scientist Enid Wistrich, "using its authority as the top government department to influence the political leaders and secure the implementation of its blueprint." It was as if the Office of Management and Budget were run by University of Chicago economists.

Banking on Treasury

Douglas and Richardson needed considerable help in drafting their programs, getting them through the cabinet—where most of their colleagues cared very deeply about being re-elected—and driving the reforms down through the bureaucracy. What is startling is where that help came from.

It came in the shape of the Treasury, New Zealand's most elite and powerful department. Treasury provided not only the intellectual foundation for many of the reforms but also the technical expertise needed to translate theory into reality. "The Treasury became the life-support system for Douglas, Richardson, and other politicians trying to reform the system," says one longtime government watcher.

Treasury also brought an intellectually rigorous approach to New Zealand's reforms that had no parallel in either the Reagan or Thatcher administrations. "It became a 'think tank' for the neo-liberal [in the classical sense of the word] movement," writes political scientist Enid Wistrich, "using its authority as the top government department to influence the political leaders and secure the implementation of its blueprint." It was as if the Office of Management and Budget were run by University of Chicago economists.

New Zealand's Treasury had not always been a hotbed of free market thought. In fact, until the mid-to-late 1970s, Keynesianism was its economic orthodoxy. It was about this time that Roger Kerr (now director of the New Zealand Business Roundtable) landed at Treasury after 10 years in the Foreign Affairs Ministry. "It dawned on me after a year or two that Treasury's lofty reputation was unfounded," says Kerr. "There was lots of dopey thinking and not a high level of intellectualism in economics."

Appointed the second director of Treasury's Economics II division, which was charged with long-term economic thinking, Kerr quietly set about changing the institution. Speakers gave

seminars on the latest economic thinking, exposing the Treasury staff to new monetary thinking, organization economics, supply-side economics, and public choice theory. "We got into the game of tapping into the really good brains from around the world," remembers Kerr.

Kerr also began aggressively recruiting the country's best young minds from the universities. Kerr "was an intelligent coach," recalls Rob Laking, a Treasury colleague. "He had a tremendous ability to pick out, recruit, and cultivate talent."

There was soon a growing cadre of free market intellectuals inside Treasury. While then–Prime Minister Roger Muldoon was experimenting with industrial policy and instituting wage and price controls, Kerr and his colleagues were busy writing alternative policy. "It was a remarkable feat of institution building," says a leading political commentator. "They got the department into an excellent state when Muldoon was making little use of them."

Though many of the policies advanced at Treasury were based on an appreciation of free markets, they were grounded in what was becoming mainstream academic economics, rather than the writings of prominent classical liberals. "At the time, most of us hadn't even read people like Hayek," explains Kerr. "[Milton] Friedman and others were not our touchstones at all." Partly because of this, the policies didn't carry the ideological and party baggage of the Reagan and Thatcher reforms.

This proved helpful politically when Labour was looking for a detailed economic plan. Treasury presented a 325-page report to the incoming government proposing a far-reaching liberalization program. Titled *Economic Management*, the report is almost universally considered the bible of the reform program.

Capturing the Bureaucracy

One of the most interesting features of New Zealand's reforms was the extent to which they were shaped by cutting-edge economic and political theory: public choice, agency theory, transaction-cost economics, and the latest in business management practices. Again, it was the Treasury—some of whose senior managers learned these disciplines in U.S. graduate schools—that was largely responsible for furnishing the reforms with their intellectual underpinnings.

After Labour's re-election in 1988, Treasury submitted another book-length report to the government. Turning its attention to the bloated public sector, the brief struck a distinctly public-choice note: "The state is not an omniscient and omnicompetent solver of social problems, but rather is subject to the same pitfalls that face private solutions to social problems plus other ones."

But instead of simply using public choice to explain why government doesn't work—about all that public choice has really been used for in America—Treasury went a step further. It used the theory's insights to devise a series of institutional countermeasures to minimize or offset the self-aggrandizing activities of public employees and interest groups.

For example, a central problem identified by public-choice theorists is "agency capture." This refers to the tendency of service departments to capture the policy-advice process, using this power to recommend themselves as service providers and to bias policy advice toward increasing the size of their budgets. To cite one instance, the U.S. Air Force once contracted with the RAND Corporation to do a study demonstrating the need for strategic bombers.

Richard Prebble: The street-fighting ally of Roger Douglas "appeals to people who have a taste for blood in politics," says Member of Parliament Rodney Hide, a longtime acquaintance. "He doesn't mind at all if people hate him; in fact I think he relishes the attention."

To counteract such agency capture, policy advice was separated from service delivery, which in turn was separated from regulatory functions. Dubbed the "purchaser/provider split," the goal was to free policy advisers to advance options that are in the public's best interest but may be contrary to the self-interests of the department. From prison services to road design, policy units now "purchase" services (called outputs) from their choice of public and private service providers. The new incentives this creates have turned the policy units into more discriminating consumers.

The Treasury also tried to figure out how to get public managers to achieve the results desired by the party in power. (It's not easy; one minister likened it to "pulling on a lever not attached to anything.") What they came up with was a series of accountability mechanisms—performance contracts, purchase agreements, accrual accounting, output-based budgeting—designed to help achieve some degree of political control over the bureaucracy. "The combination [of the mechanisms] really holds our feet to the fire," says a senior public manager.

Street Fighting Man

To get a better idea of just how far New Zealand's reforms have gone, consider just one department, the Ministry of Transport. Prior to the reforms, Transport owned and operated the ports, a national airline, the railroads, the air traffic control system, the airports, the ships, and so on. In its regulatory role, the ministry protected the same industries—and others—from competition.

Today, the Ministry of Transport doesn't run any transportation industries—they have all been privatized or corporatized. And from trucking to taxicabs, transportation markets have all been deregulated. Ministry employees, once numbering 4,500, can now all fit into two floors of a downtown office building. The results? Road freight rates are down by one-quarter. Domestic air fares have fallen in real terms at the same time air service has improved (Air New Zealand is now considered one

of the best airlines in the world). As for taxi service, I never waited more than five minutes for a cab in three weeks in the country—and the fares were reasonable.

A leading actor behind the story of the Incredible Shrinking Ministry is Richard Prebble, Douglas's closest cabinet ally. Prebble held numerous cabinet posts in the Labour government, including minister of railways, minister of transport, and minister of state-owned enterprises (where all state trading activities, once constituting over 20 percent of the country's total investment, were placed under his supervision).

In one post after another, Prebble observed that state enterprises were not exactly paragons of efficiency. At the end of a rail line that had been abandoned for 20 years, he found a warehouse still in operation. A storeman was working in the warehouse, keeping a full inventory of supplies for the line. No one had ordered a supply from the warehouse for 20 years. It is no wonder Railways, the government railroad, was losing NZ$1 million a day. Other enterprises were little better. Australia's least efficient port was more efficient than New Zealand's most efficient port, boosting transport costs for businesses and farmers. Strong action was needed, and Richard Prebble was the ideal man to take it.

While not a big man, he has the swagger of a street fighter —and you can be sure he'd throw the first punch. "Preb appeals to people who have a taste for blood in politics," says Member of Parliament Rodney Hide, a longtime acquaintance. "He doesn't mind at all if people hate him; in fact I think he relishes the attention." A "political Rambo," says one detractor. "He doesn't fight clean," says a friend.

Such qualities made Prebble valuable to a government trying to downsize. Whenever someone had to break some unpleasant news to certain groups, Prebble was sent in. Former colleagues were amazed at how much heat he could take. "Every other politician I've ever known will at some point have that look of fear in their eye when opposition becomes too intense," says Rob Laking, who worked with Prebble on numerous privatizations. "But not Prebble. He's fearless—he never loses his bottle."

Soon after Labour took office, Transport Ministry officials went to Prebble and told him the air traffic control equipment was antiquated, asking for an additional NZ$150 million to upgrade it. "Prebble said, 'Get lost. There's no bloody way this government can afford it,'" recalls a Transport official who was there. "'Corporatize it,' he said. 'Let it raise its own money on the open market.' When we expressed some apprehension, Prebble got very red. He glared at us and barked, 'Get it done. I want a bill in the house by the end of the week.'"

Soon Prebble and the Labour government had corporatized all commercial trading activities owned by the government (including state-owned commercial forests which were ingeniously renamed "wood plantations"). The unions went along reluctantly when the government assured them they had no intention of privatizing the enterprises. "When we started out, we believed there weren't any inherent reasons why the state couldn't manage enterprises as well as the private sector," explains former Deputy Finance Minister David Caygill.

Corporatization led to sharp staff reductions and significant productivity gains in most enterprises. At the government-run mail service, New Zealand Post, for example, average productivity doubled, costs fell by one-third, and the percentage of next-day delivery rose by 20 percent. Stamp prices were actually cut by five cents.

Nonetheless, people still tended to treat the state-owned enterprises differently from private companies. When the chairman of a major SOE came to him with certain investment recommendations, Prebble was skeptical. "I said to him, 'If this was your own company, would you do this?'" remembers Prebble. "He gave me a straight-faced answer: 'No.'"

For these reasons—and because the government needed the cash to pay down huge debt burdens—the government shifted course and began aggressively privatizing the SOEs, a program that National continued. The results have been dramatic. One example: Railways reduced the number of employees from 22,000 to 4,000 (part of this reduction occurred under corporatization) and cut freight charges in half. The privatized railways are now one of the world's best, according to the World Bank.

Phone service is also much better. It used to take six weeks to install a phone in New Zealand. Now, the privatized New Zealand Telecom guarantees hookup within 24 hours, or the customer gets NZ$50 in long-distance calls free. At the same time, the work force at Telecom has dropped from 27,000 to 8,500. But the presence of hundreds of new companies in the country's telecommunications market means that more people are employed in the communications sector than ever before.

Privatization dramatically altered the New Zealand public landscape. "Of all the changes wrought by the Labour Government...privatization may well have the greatest long-term impact on the society and politics of New Zealand," writes Colin James, New Zealand's leading political commentator, in his book *New Territory*. But while all this was happening, where were New Zealand's once-feared labor unions?

The Unions Strike Out

Conventional political wisdom says you need to achieve consensus support *before* embarking on reform; otherwise the re-

Ken Douglas: The head of New Zealand's largest group of trade unions says, "I'm in favor of voluntary unionism." A lot of workers are much better off. Unemployment has fallen from around 10 percent to 5.5 percent, and real wages have grown briskly for skilled workers.

forms will prove unsustainable. Roger Douglas doesn't buy this argument. "Consensus among interest groups almost never arises before decisions are made," he says. "It comes after they are taken, as the public sees satisfactory results." If you wait for consensus, he says, all you do is give interest groups time to organize. A better strategy: Make your next move while opponents are still trying to mobilize against the last one; this way you force them to fight uphill. That was the strategy followed when it came to reforms affecting labor unions.

First, the Labour government dealt several critical blows to public unions. Privatization and corporatization removed 22,000 state employees from the core public service; many employees left the union in the process. Within months after his ministry was turned into an SOE, the new chairman of the Forestry Corporation had nearly 90 percent of the employees (all of whom had to reapply for their jobs) signed up on individual contracts. Before the unions had recovered from corporatization, the government was already talking about privatization. "Things were moving so fast that I don't think the unions realized what was going on," says one observer. "By the time it became apparent that privatization was on the table, it was too late to stop the momentum."

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With public unions preoccupied battling privatization, the government rammed through Parliament the State Sector Act, which effectively broke up the unified public service. It gave department heads, called chief executives, total control over hiring, firing, pay, promotion, and industrial relations; abolished statutory criteria governing collective bargaining and compulsory arbitration; and allowed all state employees to opt out of collective bargaining contracts and be put on individual employment contracts.

"The public unions were broken by the State Sector Act," says one high-ranking New Zealand official. "The stranglehold of their combined grouping was snapped."

Ironically, Labour's lead M.P. for the State Sector Act was Don Rodger, the former head of the public employees union. Nevertheless, Labour didn't even consult with the unions about the legislation. "The Labour government had no great love affair with the public unions," says Roger Kerr. "It was almost that because they couldn't make the grade on labor reform in the private sector that they were willing to go so far in the public sector."

If the Labour Party was unwilling to deregulate the private labor markets (Douglas was willing, but politically unable), National was more than happy to finish the job. Soon after taking power, National passed the Employment Contracts Act in May 1991. Considered the most aggressive and far-reaching labor market deregulation in the world, the ECA established freedom of association for individuals, abolishing compulsory union membership and union monopoly powers. The unions' legal status is now no different from that of any other private association. In the five years since the ECA was introduced, private union membership has plummeted by one-third.

Ken Douglas, the president of New Zealand's Council of Trade Unions (the equivalent of our AFL-CIO), explains how the unions let this happen (and in the process became the laughingstock of the international labor movement). A large man of Irish descent in his 60s, with white hair and a bulbous red nose, he is the spitting image of Tip O'Neill.

When National first unveiled the details of the ECA, the unions profoundly underestimated the government's resolve. "I told the unions, 'They've got this bill, it's well prepared and its going to pass,'" recalls Ken Douglas. "But we had union leaders saying, 'No, they won't do it. The employers will want order.' They were naive. National had seen how Labour thoroughly ignored the unions and got away with it, so they did the same thing."

Though the disagreements within the union movement delayed a strong response, eventually the unions would mount the highest level of industrial protest the country had ever seen. But unlike in France, where two years ago the unions were able to defeat a government austerity package by shutting down the country for three weeks, there was no general strike. The individual unions wouldn't support a general strike," says Douglas bitterly. "Our union movement was strong on rhetoric and short on delivery."

Despite his denunciations of the ECA, Douglas wouldn't go back to the pre-ECA days. "Compulsory unionism is why the union movement was so weak here," says Douglas. "I'm in favor of voluntary unionism." It turns out that a lot of workers are much better off under the ECA. Unemployment has fallen from around 10 percent to 5.5 percent, and real wages have grown briskly for skilled workers.

Replicating New Zealand

New Zealand's reforms have attracted considerable international attention—it is said that government reform is the country's best tourism draw. The hundreds of government delegations, academics, and policy wonks who converge on New

Zealand each year all have the same question: Can the New Zealand model be replicated in my country? That depends.

Already, at least one government—the state government of Victoria in Australia—is aggressively following the New Zealand model, and Great Britain has instituted many of the same reforms. There is considerable interest in New Zealand's state sector reforms from both Rep. Scott Klug of Wisconsin, the GOP's point man on federal privatization, and from the folks at Al Gore's National Performance Review. Some of New Zealand's public sector reforms will almost surely find their way into the federal government and to some states.

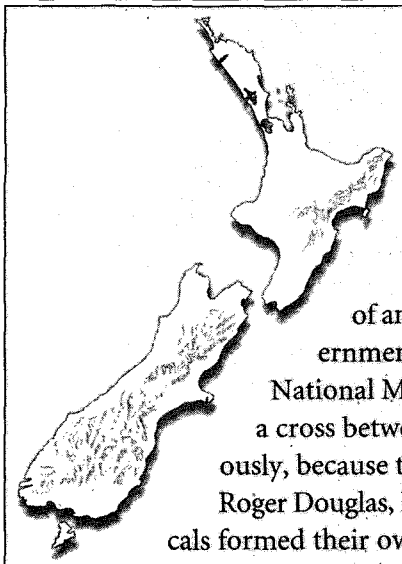
But can the New Zealand model be duplicated holistically in the United States? Fat chance, say the experts. "I think it would be impossible to have such a sweeping overhaul in the United States," says UCLA political scientist Susan Lohmann. "There are too many veto players." Not only that, but transforming a country of 3.5 million people is a lot easier than one of 270 million.

"When talking about the changes in New Zealand, we're talking about an enormous range of changes—macroeconomic, labor markets, health, housing, education, social welfare, privatization, public sector reforms—you name it, we probably changed it," says Victoria University professor Jonathon Boston. "I can't imagine that any other society, in the absence of war or pestilence, will seek to re-engineer virtually every significant public institution simultaneously like we did."

At the national level, Lohmann and Boston are probably right. But a smaller government—a state, city, or county—where the executive and legislative branches are controlled by the same party would have at least a fighting chance. And at least one individual believes the New Zealand model can be duplicated.

"Sure, it's doubtful that you could sell a program like New Zealand's to the public in advance," says Roger Douglas. "But it can be done if you're willing to do it and then take the public with you. But in order to win, you have to be willing to lose."

William D. Eggers (wdeggers@reason.org) is director of privatization and government reform at the Reason Foundation and the co-author of Revolution at the Roots: Making Our Government Smaller, Better, and Closer to Home *(The Free Press).*



After the Revolution

On October 12, New Zealand held a general election, the first under a proportional representation system approved by voters in 1993. The new electoral system was endorsed by voters who clearly wanted to reduce the ability of the party in power to make sweeping changes.

National, the incumbent party, received the largest percentage of the vote of any single party. After six weeks of negotiation, National formed a coalition government with New Zealand First, a populist party led by Winston Peters, a former National M.P. Peters is anti-immigrant, anti–free trade, and anti–big business—kind of a cross between Pat Buchanan and Ross Perot—but you can't take his positions too seriously, because they change so often.

Roger Douglas, Richard Prebble, and a few other disenchanted Labour and National party radicals formed their own party, ACT. Quasi-libertarian, its platform calls for educational vouchers, a flat tax, and privatizing social security. ACT squeaked by the 5 percent threshold needed to garner parliamentary representation. Though hardly an impressive showing, it is not terrible for a new party advocating radical reform in a country that has just been through a decade of change. Led by the irrepressible Prebble, ACT's eight parliamentarians will be vocal, though their small numbers mean it will be an uphill battle to have a major influence on government policy.

Thus, a dozen years after New Zealand embarked on the most radical and comprehensive set of government reforms seen in the industrialized world, further market-based reforms are likely to be on hold. What happened?

The probable answer is the simple one: A majority of New Zealanders want a breather from the relentless pace of change. But free market advocates shouldn't be dismayed. While not a resounding vote of confidence, the people clearly did not vote to reverse the reforms. (Alliance, the major party of the left, saw its share of the votes drop from 18 percent to 10 percent.) The New Zealand experience shows above all else just how much can be accomplished in that limited time by determined reformers with vision.

—**William D. Eggers**

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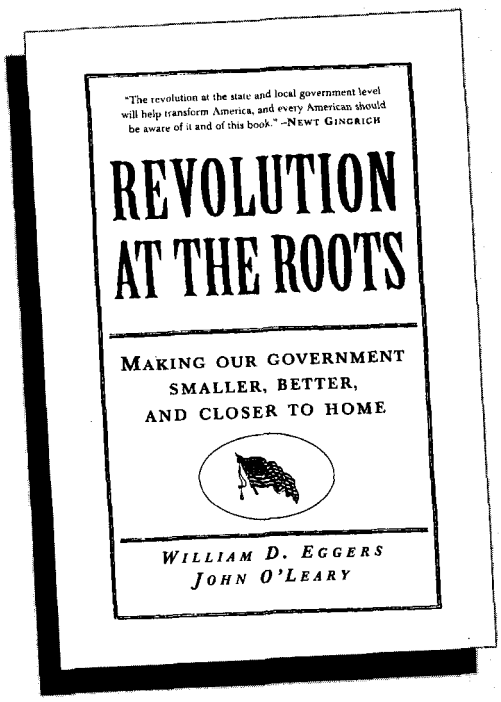
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The Screening of America

Crime, cops, and cameras

By Brian J. Taylor

New Yorkers enjoying a day in Central Park may soon be smiling for more cameras than they are aware of. The police may be joining friends and relatives in taking their pictures.

Despite a three-year, 38 percent decline in crime in New York City, and despite Mayor Rudolph Giuliani's boast that Central Park "is probably the safest urban park in the United States," the NYPD is considering placing surveillance cameras there, as well as in other city locations. A police department spokesman says it's just one of many crime-fighting measures being considered at the behest of the police commissioner, with the support of the mayor. And, one could add, to the likely indifference of most citizens to the invasion of their privacy.

At a February 4 press conference, Police Commissioner Howard Safir announced his plan to begin placing surveillance cameras (in the form of closed-circuit TV) in several locations throughout the city, primarily in housing projects and subways. By mid-summer, reports *The New York Times*, Giuliani and Safir will decide whether to expand the surveillance program.

And while Safir was oblique about the number and location of cameras to be deployed, one thing is certain: New York is only the latest in a growing number of cities across the country and around the world whose citizens are having their every public move monitored, recorded, and analyzed by law enforcement officials and private security.

Following the lead of Great Britain—where several hundred localities already monitor and record everything from cars driving the wrong way on one-way streets to random faces in a crowd—cash-strapped municipalities are lining streets, sidewalks, boardwalks, and subways with surveillance devices in place of police.

As these cameras get smaller and cheaper, they are also getting more sophisticated. Many cameras already pan and tilt 360 degrees, have zoom lenses capable of reading a cigarette package at 100 meters, and come equipped with infrared sensors, motion detectors, bullet-proof casing, and small wipers in case rain or snow blurs their vision.

In addition, high-tech listening devices, designed to detect and pinpoint gunfire, are now being attached to street lights in some high-crime residential areas. Display ads for these devices appear in the pages of such journals as *Law Enforcement Product News*; the companies offering them constitute an industry that is already worth $2.4 billion, according to the market research firm STAT Resources, and is growing fast.

While private-sector surveillance is commonplace and widely accepted—recording devices are ubiquitous in and around malls, airports, banks, ATMs, elevators, and parking garages—the trend of placing cameras in public areas for use by law enforcement is a new and disconcerting variation on the established practice. Its utility in crime reduction has yet to be convincingly demonstrated; its morality has yet to be explored in open public-policy debate.

Placing cameras in the public square is usually supported by businesses and residents whose neighborhoods are plagued by drug- and gang-related violence. Support from the business community, for example, was instrumental in starting Baltimore's Video Patrol Program, the largest such undertaking so far in the United States. There, 16 cameras enclosed in elongated cases resembling mailboxes monitor the downtown Lexington Market area. Camera images are fed into a central kiosk where they are watched around the clock. *The Baltimore Sun* endorsed the program, asserting optimistically that "there is no reason to believe the machines will be used to impinge on people's civil liberties."

Baltimore's experiment, begun in January 1996, hasn't gone unnoticed: "Sixty-five cities have called me who are looking to set up their own surveillance cameras," says Frank Russo, public safety director of the city's Downtown Partnership. Among them: New Orleans, Cincinnati, Honolulu, and Portland, Oregon. The Baltimore police have even compiled an information packet about the program.

Similarly, residents of Tacoma, Washington's inner-city Hilltop neighborhood formed the Hilltop Action Coalition to combat the drug dealers, gang members, and prostitutes congregating in their streets. The coalition's director, Darlena Gray, says that residents would ask at block meetings why they couldn't use cameras to discourage crime in their neighborhood the way many business owners use cameras to prevent shoplifting. Because the community overwhelmingly backed such a measure, Gray sought and received a federal grant from the Department of Justice for the six cameras currently in operation.

Three minutes away from the camera locations, at a Tacoma police substation, officers can control the cameras with toggle switches and watch the displayed images on a pair of color monitors. An officer will see crimes in progress on the station house monitors and relay the description of the suspects to officers already in the area, who quickly apprehend them. This system works extremely well, considering that the cameras aren't hidden. According to Tacoma police, drug dealers know they are being watched—occasionally they wave at the camera.

Gray says Hilltop residents are supplementing cameras with other measures to take back control of their neighborhood—from new fences to strategic lighting—and don't find the cameras intrusive. She says their neighborhood was so ravaged with drug- and gang-related violence before the

cameras came that residents couldn't even drive down certain streets, and they welcome the change.

Back in Baltimore, some residents are also trying to bring cameras into their neighborhood. And that has alarmed Susan Goering, executive director of the American Civil Liberties Union's Maryland chapter. She finds the Supreme Court's privacy standard—that your privacy is not violated unless you have "an expectation of privacy"—insidious because it allows what she calls "a creeping invasion." When residents invite cameras into their communities, for example, they certainly no longer "expect" privacy, so there is little basis for a legal challenge should anyone object later.

Goering fears that people are too willing to cede their rights for a modicum of security, and she is concerned that surveillance measures might be abused. Law enforcement might be tempted to use surveillance for other purposes, she suggests, like videotaping people at a peaceful demonstration or rally. They might also suspect you of a crime simply because your image is picked up in a neighborhood with a known drug trade.

Surveillance cameras once merely tracked shady activity indoors (as in this photograph of a 1995 bank robbery in Oneonta, New York). Cities now use cameras and listening devices in parks and on public streets.

AP / WIDE WORLD PHOTOS / FBI

Defenders of hidden-camera law enforcement argue that blanketing streets with such devices is no different from having a cop on every corner. Many legal experts claim there is no genuine expectation of privacy in public areas, so the legality of state-sponsored surveillance does not even arise.

University of Oklahoma law professor Randall Coyne disagrees. The use of cameras, he argues, is indeed an invasion of privacy. Coyne says the captured images constitute a search within the meaning of the Fourth Amendment.

But Coyne's is a lonely voice: There is no apparent organized opposition in the communities that employ surveillance techniques. The only exceptions are local chapters of the ACLU, and none of these is planning a legal challenge.

Do surveillance cameras actually reduce crime? Anecdotal evidence suggests they do—at least in the immediate vicinity of the cameras. But there is reason to believe that crime is not so much reduced as displaced, pushed beyond camera range.

Police departments across Great Britain credit cameras with dramatic crime reduction, citing such impressive results as a 75 percent drop in Airdrie, Scotland, a 68 percent reduction in Glasgow, Scotland, and a 57 percent drop in Northampton, England. But Privacy International, the London-based civil liberties organization, claims the British studies are not methodologically credible. It quotes *The British Journal of Criminology*, which dismissed British police research methods as "*post hoc* shoestring efforts by the untrained and self interested practitioner."

While there are few American studies in this relatively new research area, Jeff Fryrear of the National Crime Prevention Institute does give surveillance measures a qualified endorsement as crime-fighting tools. CCTV, he says, can be effective in specific strategic locations to thwart a specific type of crime, but he is reluctant to credit the cameras with the power of cutting total crime levels.

Baltimore's business community and law enforcement officials are pleased with the results of their program and plan to saturate the downtown area with 200 cameras. Police Maj. Peter McMahon, whose district the cameras are in, compared crime incidents in a three-month period before and after the cameras were installed. He found a 50 percent reduction after installation. But to determine whether crime was simply being pushed into other neighborhoods, he looked at the entire downtown area, finding a more modest decrease of 4 percent. He attributed this smaller drop to the use of cameras, too. But with crime rates decreasing nationally, largely in areas not using surveillance cameras, this is a far from obvious conclusion.

The results from Tacoma's experiment are even less clear. Police reported an initial crime reduction in the Hilltop neighborhood after installing cameras in 1993. Crime rates later rebounded, although they remained below previous levels.

"Cockroaches scatter when exposed to light," observes law professor Coyne. "Unless we wire the country from coast to coast, it will do nothing." He also notes that convenience stores and banks continue to get robbed, even though most of them employ cameras. Gray, the Tacoma community leader, acknowledges that pushing the drug trade out of her neighborhood will have an impact on the surrounding area: "We're not getting rid of anything," she says. "We're moving it around."

But even if crime rates are not lowered, recorded surveillance camera images make possible such creative and unprecedented practices as "retrospective arrest." In England, for example, disgruntled soccer fans caused a melee in downtown Newcastle in May 1996. After reviewing video surveillance tapes, police isolated 152 faces, arresting nine of the offenders immediately. They then allowed a local newspaper to publish the faces of 80 others. In a few days, they had all been identified, some by turning themselves in. (In Baltimore, tapes

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are kept for 96 hours before they are erased, unless they contain evidence of criminal activity; no tapes are made in Tacoma.)

While Newcastle business owners no doubt welcomed the arrests, the very act of recording surveillance tapes can be troubling. Take the notorious case of the British video, *Caught in the Act*, a compilation of violence, sex in elevators, and odd behavior that was captured by surveillance technology and made commercially available.

According to a "researcher" for the tape quoted last year in *The Washington Post*, video footage in the tape was purchased from insurance companies, private security companies, and local government officials. It was such a hot seller that two similar tapes were shortly released. Despite reports of a voluntary ban on releasing surveillance footage, Privacy International's David Banisar says there is active videotape exchanging in London.

As the growth in surveillance continues, Coyne expects to see similar, more gratuitous use of videotapes on TV shows like *Hard Copy*. Already, shows like *Real TV* and *Rescue 911*—not to mention pedestrian nightly newscasts—show footage of convenience store shootings and restaurant robberies taken from surveillance cameras.

Banisar claims that British police are using videotapes to crack down on such minor infractions as juvenile smoking. Indeed, a promotional booklet issued by the British Home Office recommends the use of CCTV to combat drunkenness, racial and sexual harassment, loitering, and disorderly behavior.

Closer to home, Tacoma's cameras have been directly responsible for hundreds of arrests, says patrol officer Chris Pollard, most of them for drug violations, or drinking or urinating in public. The cameras are also used to see if anyone is violating a restraining order and to read license plates to check for stolen cars.

Police cameras pointing up and down an increasing number of city streets raise the specter of a technologically powered surveillance state. If such measures continue to proliferate, law enforcement officials, well meaning and otherwise, might be tempted to use cameras and listening devices creatively, as indeed voyeuristic security personnel and spying employers monitoring bathrooms and dressing rooms have already been known to do. It wouldn't be difficult to tilt cameras off the street and toward a window, to alter listening devices on street lights for purposes of eavesdropping, or to videotape and catalog the faces of those attending meetings and demonstrations.

Already, police are tracing the license plate numbers of cars photographed driving down Hollywood's Yucca Street and sending letters to the owners informing them their cars have been spotted in a known drug trafficking area. Tacoma's Gray says her community is starting a program to do the same thing.

The New York City Department of Transportation operates an unspecified number of cameras at selected intersections around the city to capture license plates of drivers who run red lights (the registered owner of the car receives a ticket in the mail, and, to rub it in, a snapshot of the car). While a spokesman wouldn't disclose the number or location of cameras, he says they are expanding the program and that people from all over the world are calling, asking how to start their own systems.

Legal experts say surveillance technology is ahead of the law, and they expect privacy issues to be fought, if not resolved, in the courts. But if cameras are coming, *Privacy Journal* editor Robert Ellis Smith offers a few guidelines to limit the invasiveness of both private and public surveillance: Publicly announce that surveillance is taking place; articulate the reason for such surveillance (if the reason disappears, so, presumably, should the surveillance); view cameras as a temporary measure; if recording surveillance tapes, erase them if they don't contain evidence of criminal activity; and monitor those private security guards charged with watching dressing rooms and bathrooms to protect privacy.

In the meantime, smile. The chances are increasingly high that someone is watching.

Brian J. Taylor (bjtaylor@interport.net), a writer and Internet consultant in New York City, is REASON*'s Webmaster.*

Pot of Trouble

Grow marijuana for medical use in California, and you can get off. Do it in Oklahoma, and you can get 93 years.

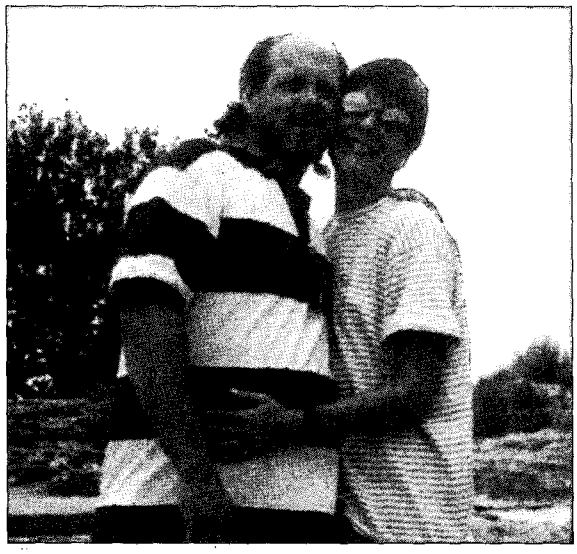
By Adam J. Smith

Will Foster, a 38-year-old father of three who lives in Tulsa, Oklahoma, suffers from rheumatoid arthritis in his back and feet. Over the years, he has tried various drugs for his condition. They were not very effective, and most contained codeine, which left him groggy and irritable, making it impossible to work or enjoy time with his children. Marijuana, by contrast, relieved his pain without disrupting his life. To minimize the chance of arrest, Foster decided to grow his own supply, concealing a small garden in an old bomb shelter in his basement. The shelter was behind a steel door to which only Foster had the key. None of his children knew about the garden or saw the marijuana. It was important to him that his choice of treatment cause no confusion for his kids, that their childhoods be as normal as possible.

The police had different plans. Now Foster may face the equivalent of life in prison for growing and using a forbidden medicine. He does not seem like the sort of man who belongs behind bars. A five-year Army veteran who served as an M.P., Foster has operated his own software business for four years. He has never had so much as a fistfight; his most violent tendencies are bird hunting and, when he feels up to it, weekend war games with paint-ball guns. In short, he is a decent, productive citizen who threatens no one except drug warriors who cannot abide the notion that marijuana could be good for anybody. Will Foster is someone to keep in mind when drug czar Barry McCaffrey insists that patients and doctors who use marijuana as a medicine should be treated like criminals.

On December 28, 1995, the Tulsa Police Department's Special Investigative Division received a tip from a "confidential informant" that Foster was selling methamphetamine from his home. That information was enough to obtain a warrant, specifying methamphetamine as the object of the search, and late that afternoon there was a knock on the Fosters' door. Will's wife, Meg, disengaged the lock, only to have the door "explode inward" as the police knocked it in with a battering ram, knocking her to the floor, nearly on top of their 5-year-old daughter. "There were guns in my face," she recalls. "Men in street clothes demanding to know who I was. My daughter was terrified and screaming frantically the entire time: 'Don't hurt my mommy!' It was at least five minutes before I understood that these were police officers."

The police held Will, Meg, their daughter, and a visiting friend, a diabetic recovering from surgery, for four hours while they tore the house apart. During the search, Meg says, one officer threatened to "kick my ass to the north side of town if I did not tell him what he wanted to hear." The same officer, she says, later yanked Will's cuffed hands straight up behind his back and threatened to break them if Will did not tell him where the "meth" was. Meg says she eventually convinced the officers to un-cuff their convalescing friend "before they killed him." The Tulsa police declined to comment on the search or any other aspect of the case.



Will and Meg Foster: To ease the pain of rheumatoid arthritis, Will smoked marijuana and raised a small garden in an old bomb shelter in his basement. The former Army M.P. now faces a 93-year prison sentence.

Despite a thorough search, which included tearing apart the 5-year-old's teddy bear, the police found no trace of methamphetamine in the Fosters' home. Nor did they find anything indicating that the drug had ever been sold there. (The total amount of cash in the home was $28.) At one point, Meg says, one of the officers sat on the couch and told the others, "I'm not participating in this—we messed up," and refused to continue helping with the search. But the police did find Will Foster's medicine: about 70 plants, many of them seedlings. The Fosters were arrested and held on bonds of $35,000 each. "I spent the night in jail," says Meg, who calls it "the worst experience of my life."

Will Foster, indignant at being arrested for his choice of medical treatment and concerned for the welfare of his family should he be sent to prison, turned down an offer of a 12-year sentence from the Tulsa County District Attorney's Office and demanded a jury trial. In an apparent attempt to pressure the Fosters into cooperating, the district attorney's office put the names of the Fosters' three children, including the 5-year-old, on the prosecution witness list. The Fosters, hoping to ensure that one of them would remain free to raise the children, decided to accept the prosecutors' offer of misdemeanor charges for Meg in return for her testimony against Will.

On October 22, 1996, still awaiting trial, Will Foster was filling the gas tank of his wife's car at a convenience store when a police car pulled up, ostensibly to cite him for

failure to signal a turn. The officers called him by name and made a call from their cellular phone. They searched Foster and the car, finding nothing.

During the search, members of the same Special Investigative Division that had been involved in the December search and arrest showed up. Foster says he heard them tell the uniformed police, "No, you pulled him over in the wrong car. We wanted the truck." Foster's truck was fully paid for and thus would have been subject to forfeiture. His wife's car, on the other hand, still had a bank lien on it. As a consolation prize, the police seized the $200 that Foster was carrying at the time. Deciding that Foster "smelled of marijuana," the officers arrested him and brought him to the station, where he was held without processing for 11 hours before being released after paying a $390 fine for the traffic violation.

While Foster was in custody, the police obtained another search warrant, based on the alleged marijuana smell. They entered the Fosters' new home, to which the family had moved in September, using Will's own keys, which they had confiscated from him as "proof of residency." This time the warrant listed marijuana as the object of the search, and the police claim to have found some. (Meg Foster says, "I know for a fact that there was no marijuana in my house. Lord knows that Will had been living with his pain since the arrest.") Foster now faces additional charges stemming from this search. The district attorney's office declined to comment on the second search, citing the ongoing nature of the case.

After Will was released from custody, the Fosters returned home to find that their possessions had once again been ransacked. "My youngest daughter...kept screaming, 'They're back! They're back!' " Meg recalls. "I wouldn't let her in past the kitchen." The girl had been plagued by memories of the first search. "It will hit her at the weirdest times," Meg says. "All of a sudden she'll start crying or screaming. She's still having terrible nightmares. She just turned 6 years old, and she doesn't understand why Will can't come home."

At the trial stemming from the initial search and arrest, Foster's attorney, Stuart Southerland, having had no experience with medical marijuana, decided not to attempt a medical necessity defense, which is not explicitly recognized by Oklahoma law. The point was raised, briefly, as a mitigating factor, in arguing that Foster's offense should be treated as simple possession. But no medical experts were called, and no testimony was heard about marijuana's effectiveness as an analgesic for conditions such as Will's. Tulsa County Assistant District Attorney Brian Crain, who prosecuted Foster, says, "It wouldn't have mattered anyway, because it's illegal to use marijuana medically in Oklahoma."

The prosecution offered testimony that the plants found in Foster's home were equivalent to 2,652 "dosage units" (joints) of marijuana. Marijuana cultivation expert Ed Rosenthal, testifying for the defense, said a 25-square-foot indoor garden such as Foster's could reasonably be expected to produce about a dozen ounces of usable marijuana per crop, something like 600 joints. The state also offered zip-lock sandwich and freezer bags as evidence of drug distribution. Many of the bags found in the house had actually been filled with the paint balls that Foster shared with his buddies during their occasional weekend war games.

While simple possession of marijuana in Oklahoma can be treated as a misdemeanor, the state treats cultivation of "all species of plants from which a schedule I or II substance can be derived" as a felony. The sentence for cultivation, regardless of the number of plants, is a minimum of two years and a maximum of life imprisonment. Crain says he asked the jury to recommend "20, 200, 2,000, whatever number of years they wanted to give" to Foster. On January 16, following Judge Bill Beasley's instructions and the sentencing guidelines, the jury gave these verdicts and recommended sentences:

- Guilty of cultivation and possession of marijuana, a Schedule I substance. Recommended sentence: 70 years.
- Guilty of the aggravating factor of possession in the "presence of a minor, under age 11." Recommended sentence: 20 years (the maximum for that charge).
- Guilty of possession with intent to distribute. (Foster admitted during the trial that he had occasionally shared some of his marijuana, consumed in his home.) Recommended sentence: two years (the minimum for that charge).
- Guilty of failure to procure a state tax stamp for the (illegal) distribution. Recommended sentence: one year.

Total: 93 years.

Crain says the sentence was appropriate "because it falls within the statute, and I think that the statute is appropriate." He adds that, due to Oklahoma's severe shortage of prison space, jurors feel they must hand out extremely long sentences to ensure that significant time is served. He notes that for parole and pardon purposes each charge is considered to have a 45-year maximum, and it is "possible" that Foster could be paroled on the 70-year cultivation sentence after serving as little as eight years. But cultivation in the presence of a minor carries a 50 percent minimum, meaning that Foster would have to serve at least 10 years of that 20-year sentence. At a hearing on February 27, Judge Beasley said the two sentences will run consecutively.

Foster, who is now in prison, may have grounds for appeal. It appears that Beasley mistakenly excluded two defense witnesses, based on the prosecution's assertion that Southerland did not give adequate notice of their appearance. Southerland says he has evidence that proper notice was in fact given, in which case an appeals court might order a new trial.

"The hardest thing was coming home after the verdict and telling those beautiful kids," says Meg Foster. "They love him so....I don't think the jury ever thought about that. I wish for one day they could stand in my shoes. After all, we let out rapists, murderers, and child molesters in less time. Ninety-three years is a long time ...for what is only a plant that God put on this planet." The Fosters have already used up their children's college funds for Will's defense and had to borrow money from relatives. Meg, who is trying to keep her husband's business afloat, cannot bill his clients because the police have seized their home computer, along with all of Will's business records.

"Once upon a time this was a man who believed in America and what she stood for," she says. "Right now, we are all just very disillusioned." ◆

Adam J. Smith (ajsmith@intr.net) is assistant director of the Drug Reform Coordination Network in Washington.

Road Hogs

Will Congress cut back the transit pork?

By Ed Carson

The House Committee on Transportation and Infrastructure recently expanded from 67 to 73 members, making it "the largest [congressional] committee in history," according to its chairman, Rep. Bud Shuster (R-Pa.).

What warrants placing one in six House members on a single committee? Except for a few intra-city projects, the Interstate highway system is finished. Transportation spending makes up no more than 2 percent of the $1.6 trillion federal budget. But that doesn't measure transportation's political importance. Entitlement programs eat up more and more of the budget, but they essentially run on autopilot. (They may be flying into a cliff, but it is on autopilot.) And representatives can't exactly promise to bring home more Medicare to their districts. Transportation is one of the last areas where individual congressmen can personally deliver federal dollars to constituents in a literally concrete way. Or as Rep. John Linder (R-Ga.) says, the Transportation Committee is the "last place for pork."

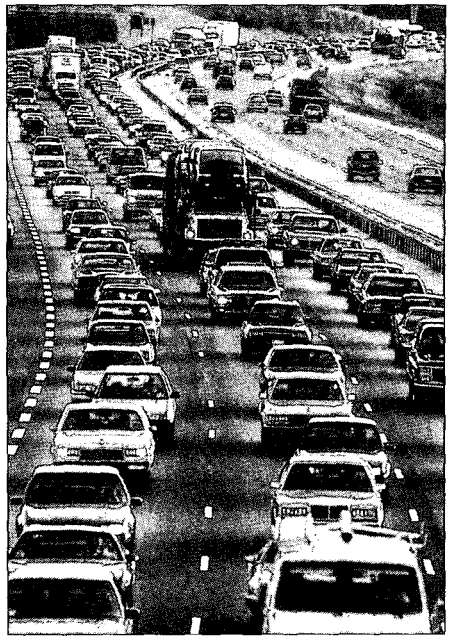
It takes on added significance this year because the Intermodal Surface Transportation Efficiency Act of 1991 is up for reauthorization. ISTEA (pronounced "ice tea") provides the money—$155 billion between 1992 and 1997—to state and local governments for transportation projects, with the feds typically picking up 80 percent of project costs. ISTEA is funded by a 14-cents-per-gallon federal gas tax (an additional 4.3 cents goes to general revenues) and taxes on diesel fuel and truck tires.

First, Congress takes care of its own. Right off the top come members' demonstration projects—"high-priority" projects, insists House Transportation Committee aide Jeff Nelligan. ISTEA contained 538 projects costing $6.2 billion. And what "high-priority" needs do these projects meet? Well, Shuster's hometown of Altoona, Pennsylvania, once got a $30 million motorized sidewalk. Residents may not be getting too much use out of it, however, because they're too busy driving down the $286 million Bud Shuster Highway. And that was when he was only the ranking *minority* member on the Transportation Committee. As chairman, Shuster wants to build support for the overall bill. So earlier this year he sent a memo to his fellow House members reminding them to submit requests for demo projects in their districts.

Most ISTEA funds are distributed using a formula that takes into account a number of technical criteria, such as vehicle miles traveled, diesel fuel purchased, and state population. It sounds scientific, but Sen. John Warner (R-Va.) calls the formula for the 1991 ISTEA a "witch's brew." Among other things, the formula relied on the 1980 census for population estimates rather than the 1990 census, because the older data favored Northeastern states.

Debate over the formula in this year's transportation bill will be fierce. Shuster has predicted there will be "blood on the floor, I'm sure, over the formula before we're done." There are three major proposals, each with decidedly different priorities:

■ **"ISTEA Works."** Governors and representatives from many states, primarily in the Northeast, think the current program doesn't need a lot of changes. That's not surprising, because their states get back more money under ISTEA than they pay in. Cities like ISTEA because it gives municipal planning organizations more control over where federal money can be spent. Cities and many environmental groups also like ISTEA's dedicated funds for the Congestion Mitigation/Air Quality program and for "enhancements," which include bikeways, walkways, and other transportation-related projects. Their connection to transportation can be distant: One city used enhancement funds to build a day care center at a transit station.



The new federal highway bill will test the Republican Congress's resolve to cut pork-barrel spending.

■ **"STEP-21."** The Streamlined Transportation Efficiency Program for the 21st Century is the mainstream alternative to the current system. STEP-21 guarantees states will get back at least 95 percent of the transportation dollars they put in. Majority Whip Tom DeLay (R-Tex.) and Gary Condit (D-Calif.) introduced the plan in the House, and Warner, chairman of the Environment and Public Works Transportation Subcommittee, which has jurisdiction over highways, is leading the Senate fight. STEP-21 is endorsed by representatives and governors from states that are big losers under ISTEA.

STEP-21 would provide states with more flexibility about where they could spend transportation funds, allocating 60 percent as a block grant. DeLay and seven House committee chairmen told Shuster in a letter that STEP-21 would address what they see as ISTEA's two central flaws: "An inequitable funding distribution system that fails to allocate funds based on prioritized needs; and an inefficient, inflexible

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program structure that erodes the transportation purchasing power of every state."

Critics of STEP-21 argue that funding should be allocated based on state needs, not contributions. "These are projects of national significance," says Maryland Gov. Parris Glendening. "Under a system that simply returns money to the states, they would not be properly funded." He says highways in the Northeast are more costly to maintain because they're older, used by more out-of-state drivers, and hit with colder weather. Cities are skeptical of block grants, because dedicated funding for enhancements, congestion, and air quality would be eliminated; states and local governments could, however, use general transportation funds for those purposes.

■ **"Turnback."** The third and most dramatic proposal, sponsored by House Budget Chairman John Kasich (R-Ohio) and Sen. Connie Mack (R-Fla.), would keep two cents of the federal gas tax for maintaining the Interstate system and "turn back" the other 12 cents to the states. (The 4.3 cents going to general revenues would not be affected under the Kasich-Mack bill.) Kasich and Mack argue that since the Interstate system is complete, a federal role is no longer necessary or desirable. "If you let us keep our money, and get rid of all the federal bureaucracy and all the federal rules, we'll actually be able to have more highway construction. We'll be able to deal more effectively with the transportation needs in our own states," Kasich told the House Surface Transportation Subcommittee.

Devolution would end federal demo projects and the need to pay the federal highway bureaucracy. The Kasich-Mack bill would also eliminate the federal reviews, regulations, and mandates that come with ISTEA funds. A Reason Foundation study estimates that when these federal costs are taken into account, 33 states get back less than they put in, including big states such as Illinois, New Jersey, New York, Pennsylvania, and Virginia.

Turnback advocates also say that states would do a better job of choosing cost-effective projects if they have to come up with all the money. "It's no secret that 90 percent federal funding makes for some pretty screwy decisions," says David Luberoff, assistant director of the Taubman Center for State and Local Government at Harvard's Kennedy School of Government. Would Massachusetts have gone forward with the *$10 billion*, 1.5 mile underground highway under construction in Boston if it had to pick up the tab?

Critics of devolution made many of the same arguments used against STEP-21, but with greater force. Shuster says the proposal "makes no sense." He says the Interstate system is inherently a federal, not a state, responsibility. Or as Eric Federing, a Democratic staffer for the Transportation Committee puts it, "Highways don't end at the state line."

True, but states can and do work together to solve common transportation interests. The Port of New York–New Jersey has run smoothly for decades without federal intervention. Just recently five Northeastern states agreed on a common standard for electronic toll collection.

Carl Williams, deputy secretary of California's Business, Transportation, and Housing Agency, points out that over half the states have raised their gas tax in the past five years. He believes most states would have little difficulty convincing voters to replace the federal tax with the state tax. The Kasich-Mack plan also would lift the ban on tolls on Interstate highways. That could help states no longer subsidized by the rest of the country maintain their transportation networks and allow congested states like California to expand their highways.

State constitutions present another problem: Many state constitutions prohibit gas taxes from being used on anything but highways. Texas's constitution requires 25 percent of all revenues to be used for education, so the state would have to raise its gas tax (or other taxes) well above what it required for transportation. The Kasich-Mack bill gradually phases the federal gas tax out over a number of years to give states time to deal with the political and constitutional hurdles.

Republican governors from four states—Pete Wilson (Calif.), John Engler (Mich.), George Voinovich (Ohio), and David Beasley (S.C.)—have endorsed devolution. Kasich and Mack had hoped more lawmakers from donor states would swing over to their camp. That hasn't happened, perhaps because though turnback might be better for many states, those states' members of Congress would no longer get the credit from bringing home highway projects. Whatever the reason, Kasich concedes devolution is unlikely to pass this year.

The other major battle centers on how much Congress will allocate. The federal government currently spends about $20 billion on highways, with another $2 billion to $3 billion going for transit, congestion and air quality projects, and enhancements. Transportation boosters are looking for much more, which is why Shuster is eyeing the highway trust fund. The trust fund is supposed to be used only for transportation purposes, but it has built up to nearly $24 billion and is used to mask the size of the budget deficit.

Shuster wants to take the trust fund off-budget. "Americans pay steep transportation taxes and expect the money...to be used for critical infrastructure improvements, not to be hidden in some budget-ary shell game," Shuster says. There is a strong philosophical argument that dedicated funds should be used only for the intended purpose, but taking the trust fund off-budget would make balancing the budget even more difficult. (The Clinton balanced budget plan calls for transportation spending to decline slightly in nominal dollars. No one appears to be taking this plan seriously—not even the Department of Transportation.) And turning de facto control of the trust fund over to Shuster would be a "license to steal," according to one transportation analyst.

Last Congress, the House passed Shuster's bill 284–143 over Kasich's strong objections, but the measure stalled in the Senate. The same scenario is likely to oc-

"At the very crux of our union is the concept that resources are gathered, then distributed on need," said Rep. Susan Molinari, defending the current system. Did the Founders call for life, liberty, and the redistribution of wealth?

cur this year, so the issue won't be settled until it reaches the conference committee. Warner opposes putting the trust fund off-budget, but he and 58 other senators have asked Senate Budget Committee Chairman Pete Domenici (R-N.M.) to produce a budget plan that increases highway spending to $26 billion a year. New York Sens. Daniel Patrick Moynihan (D) and Al D'Amato (R) have asked Domenici for $5 billion for transit.

That would require drawing down the trust fund significantly, unless, of course, the 4.3 cents of the gas tax that currently go to general revenues are put into the trust fund. Shuster, a highway man to the core, has suggested dedicating a half cent to Amtrak—which, after 25 years and $13 billion in taxpayer subsidies, was finally scheduled to be zeroed out by 2002—in exchange for having the remaining 3.8 cents go to the trust fund. Shuster hopes the offer will gain the support of Senate Finance Committee Chairman Bill Roth (R-Del.), a big Amtrak backer.

At this stage it's unclear how reauthorization will shake out, but most observers believe that the trust fund will not be taken off-budget and STEP-21 ultimately will be the basis for the final formula. If highway spending rises to around $26 billion, it will be relatively easy to make the formula more equitable for donor states without hurting donees. But if Kasich and other deficit hawks are successful in holding transportation spending to current levels, it becomes extremely difficult to achieve a consensus. In that scenario, it's possible turnback would suddenly gain support as a way to get more transportation bang for limited bucks. But more likely, devolution will serve the purpose of making STEP-21 look like a moderate reform.

On one level, STEP-21 doesn't represent fundamental change. It simply reworks the funding formula, this time to reflect the growing power of donor states. But while it maintains the federal role in transportation, STEP-21 may help undermine support for all federal programs.

"At the very crux of our union is the concept that resources are gathered, then distributed on need," said Rep. Susan Molinari (R-N.Y.) at a news conference endorsing the current system. It's an unusual historical perspective on our nation's founding principles—life, liberty, and the redistribution of wealth?—but it carries an important contemporary point. New York and other Northeastern states receive more transportation funding than they contribute, but overall they pay more federal taxes than they receive in federal benefits. If states get back roughly what they pay for transportation, Molinari warns, "New York and the other states represented here will demand the money back that we contribute for other programs."

If federal taxes were returned to states on a 1-to-1 basis, why include the middleman? Who would have thought that the common sense principle, you get what you pay for, could shake the federal government to its foundations?

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The Twin Paradox

What exactly is wrong with cloning people?

By Ronald Bailey

By now everyone knows that Scottish biotechnologists have cloned a sheep. They took a cell from a 6-year-old sheep, added its genes to a hollowed-out egg from another sheep, and placed it in the womb of yet another sheep, resulting in the birth of an identical twin sheep that is six years younger than its sister. This event was quickly followed up by the announcement that some Oregon scientists had cloned monkeys. The researchers say that in principle it should be possible to clone humans. That prospect has apparently frightened a lot of people, and quite a few of them are calling for regulators to ban cloning since we cannot predict what the consequences of it will be.

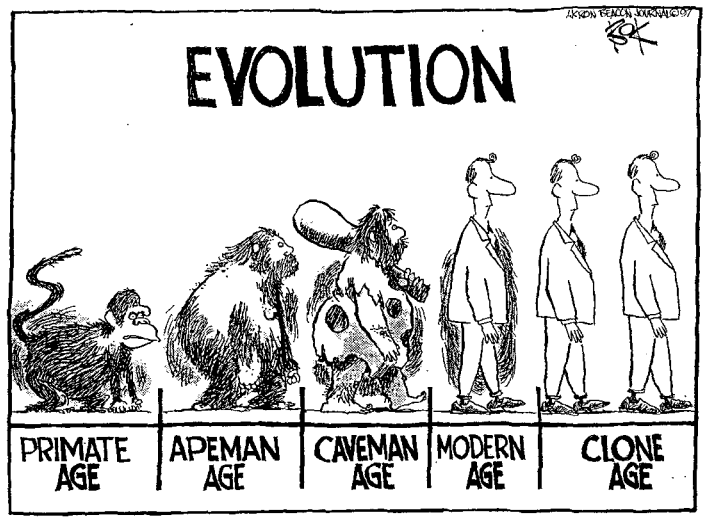
President Clinton rushed to ban federal funding of human cloning research and asked privately funded researchers to stop such research at least until the National Bioethics Advisory Commission issues a report on the ethical implications of human cloning. The commission, composed of scientists, lawyers, and ethicists, was appointed last year to advise the federal government on the ethical questions posed by biotechnology research and new medical therapies. Its report is now due in May.

But Sen. Christopher Bond (R-Mo.) isn't waiting around for the commission's recommendations; he's already made up his mind. Bond introduced a bill to ban the federal funding of human cloning or human cloning research. "I want to send a clear signal," said the senator, "that this is something we cannot and should not tolerate. This type of research on humans is morally reprehensible."

Carl Feldbaum, president of the Biotechnology Industry Organization, hurriedly said that human cloning should be immediately banned. Perennial Luddite Jeremy Rifkin grandly pronounced that cloning "throws every convention, every historical tradition, up for grabs." At the putative opposite end of the political spectrum, conservative columnist George Will chimed in: "What if the great given—a human being is a product of the union of a man and woman—is no longer a given?"

In addition to these pundits and politicians, a whole raft of bioethicists declared that they, too, oppose human cloning. Daniel Callahan of the Hastings Center said flat out: "The message must be simple and decisive: The human species doesn't need cloning." George Annas of Boston University agreed: "Most people who have thought about this believe it is not a reasonable use and should not be allowed.... This is not a case of scientific freedom vs. the regulators."

Given all of the brouhaha, you'd think it was crystal clear why cloning humans is unethical. But what exactly is wrong with it? Which ethical principle does cloning violate? Stealing? Lying? Coveting? Murdering? What? Most of the arguments against cloning amount to little more than a reformulation of the old familiar refrain of Luddites everywhere: "If God had meant for man to fly, he would have given us wings. And if God had meant for man to clone, he would have given us spores." Ethical reasoning requires more than that.



CHIP BOK

What would a clone be? Well, he or she would be a complete human being who happens to share the same genes with another person. Today, we call such people identical twins. To my knowledge no one has argued that twins are immoral. Of course, cloned twins would not be the same age. But it is hard to see why this age difference might present an ethical problem—or give clones a different moral status.

"You should treat all clones like you would treat all monozygous [identical] twins or triplets," concludes Dr. H. Tristam Engelhardt, a professor of medicine at Baylor and a philosopher at Rice University. "That's it." It would be unethical to treat a human clone as anything other than a human being. If this principle is observed, he argues, all the other "ethical" problems for a secular society essentially disappear. John Fletcher, a professor of biomedical ethics in the medical school at the University of Virginia, agrees: "I don't believe that there is any intrinsic reason why cloning should not be done."

Let's take a look at a few of the scenarios that opponents of human cloning have sketched out. Some argue that clones would undermine the uniqueness of each human being. "Can individuality, identity and dignity be severed from genetic distinctiveness, and from belief in a person's open future?" asks George Will.

Will and others have apparently fallen under the sway of what Fletcher calls "genetic essentialism." Fletcher says polls indicate that some 30 percent to 40 percent of Americans are genetic essentialists, who believe that genes almost completely determine who a person is. But a person who is

a clone would live in a very different world from that of his genetic predecessor. With greatly divergent experiences, their brains would be wired differently. After all, even twins who grow up together are separate people—distinct individuals with different personalities and certainly no lack of Will's "individuality, identity and dignity."

In addition, a clone that grew from one person's DNA inserted in another person's host egg would pick up "maternal factors" from the proteins in that egg, altering its development. Physiological differences between the womb of the original and host mothers could also affect the clone's development. In no sense, therefore, would or could a clone be a "carbon copy" of his or her predecessor.

What about a rich jerk who is so narcissistic that he wants to clone himself so that he can give all his wealth to himself? First, he will fail. His clone is simply not the same person that he is. The clone may be a jerk too, but he will be his own individual jerk. Nor is Jerk Sr.'s action unprecedented. Today, rich people, and regular people too, make an effort to pass along some wealth to their children when they die. People will their estates to their children not only because they are connected by bonds of love but also because they have genetic ties. The principle is no different for clones.

Senator Bond and others worry about a gory scenario in which clones would be created to provide spare parts, such as organs that would not be rejected by the predecessor's immune system. "The creation of a human being should not be for spare parts or as a replacement," says Bond. I agree. The simple response to this scenario is: Clones are people. You must treat them like people. We don't forcibly take organs from one twin and give them to the other. Why would we do that in the case of clones?

The technology of cloning may well allow biotechnologists to develop animals which will grow human-compatible organs for transplant. Cloning is likely to be first used to create animals that produce valuable therapeutic hormones, enzymes, and proteins.

But what about cloning exceptional human beings? George Will put it this way: "Suppose a cloned Michael Jordan, age 8,

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preferred violin to basketball? Is it imaginable? If so, would it be tolerable to the cloner?" Yes, it is imaginable, and the cloner would just have to put up with violin recitals. Kids are not commercial property—slavery was abolished some time ago. We all know about Little League fathers and stage mothers who push their kids, but given the stubborn nature of individuals, those parents rarely manage to make kids stick forever to something they hate. A ban on cloning wouldn't abolish pushy parents.

One putatively scientific argument against cloning has been raised. As a National Public Radio commentator who opposes cloning quipped, "Diversity isn't just politically correct, it's good science." Sexual reproduction seems to have evolved for the purpose of staying ahead of ever-mutating pathogens in a continuing arms race. Novel combinations of genes created through sexual reproduction help immune systems devise defenses against rapidly evolving germs, viruses, and parasites. The argument against cloning says that if enough human beings were cloned, pathogens would likely adapt and begin to get the upper hand, causing widespread disease. The analogy often cited is what happens when a lot of farmers all adopt the same corn hybrid. If the hybrid is highly susceptible to a particular bug, then the crop fails.

That warning may have some validity for cloned livestock, which may well have to live in environments protected from infectious disease. But it is unlikely that there will be millions of clones of one person. Genomic diversity would still be the rule for humanity. There might be more identical twins, triplets, etc., but unless there are millions of clones of one person, raging epidemics sweeping through hordes of human beings with identical genomes seem very unlikely.

But even if someday millions of clones of one person existed, who is to say that novel technologies wouldn't by then be able to control human pathogens? After all, it wasn't genetic diversity that caused typhoid, typhus, polio, or measles to all but disappear in the United States. It was modern sanitation and modern medicine.

There's no reason to think that a law against cloning would make much difference anyway. "It's such a simple technology, it won't be ban-able," says Engelhardt. "That's why God made offshore islands, so that anybody who wants to do it can have it done." Cloning would simply go underground and be practiced without legal oversight. This means that people who turned to cloning would not have recourse to the law to enforce contracts, ensure proper standards, and hold practitioners liable for malpractice.

Who is likely to be making the decisions about whether human cloning should be banned? When President Clinton appointed the National Bioethics Advisory Commission last year, his stated hope was that such a commission could come up with some sort of societal consensus about what we should do with cloning.

A clone would be a complete human being who happens to share the same genes with another person. Today we call such people identical twins. No one argues that identical twins are immoral.

The problem with achieving and imposing such a consensus is that Americans live in a large number of disparate moral communities. "If you call up the Pope in Rome, do you think he'll hesitate?" asks Engelhardt. "He'll say, 'No, that's not the way that Christians reproduce.' And if you live Christianity of a Roman Catholic sort, that'll be a good enough answer. And if you're fully secular, it won't be a relevant answer at all. And if you're in-between, you'll feel kind of generally guilty."

Engelhardt questions the efficacy of such commissions: "Understand why all such commissions are frauds. Imagine a commission that really represented our political and moral diversity. It would have as its members Jesse Jackson, Jesse Helms, Mother Teresa, Bella Abzug, Phyllis Schafly. And they would all talk together, and they would never agree on anything.... Presidents and Congresses rig—manufacture fraudulently—a consensus by choosing people to serve on such commissions who already more or less agree....Commissions are created to manufacture the fraudulent view that we have a consensus."

Unlike Engelhardt, Fletcher believes that the National Bioethics Advisory Commission can be useful, but he acknowledges that "all of the commissions in the past have made recommendations that have had their effects in federal regulations. So they are a source eventually of regulations." The bioethics field is littered with ill-advised bans, starting in the mid-1970s with the two-year moratorium on recombining DNA and including the law against selling organs and blood and Clinton's recent prohibition on using human embryos in federally funded medical research.

As history shows, many bioethicists succumb to the thrill of exercising power by saying no. Simply leaving people free to make their own mistakes will get a bioethicist no perks, no conferences, and no power. Bioethicists aren't the ones suffering, the ones dying, and the ones who are infertile, so they do not bear the consequences of their bans. There certainly is a role for bioethicists as advisers, explaining to individuals what the ramifications of their decisions might be. But bioethicists should have no ability to stop individuals from making their own decisions, once they feel that they have enough information.

Ultimately, biotechnology is no different from any other technology—humans must be allowed to experiment with it in order to find its best uses and, yes, to make and learn from mistakes in using it. Trying to decide in advance how a technology should be used is futile. The smartest commission ever assembled simply doesn't have the creativity of millions of human beings trying to live the best lives that they can by trying out and developing new technologies.

So why is the impulse to ban cloning so strong? "We haven't gotten over the nostalgia for the Inquisition," concludes Engelhardt. "We are people who are postmodernist with a nostalgia for the Middle Ages. We still want the state to have the power of the Inquisition to enforce good public morals on everyone, whether they want it or not." ◆

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Land Stakes

By Rick Henderson

Property Matters: How Property Rights Are Under Assault—And Why You Should Care, by James V. DeLong, New York: The Free Press, 390 pages, $27.50

This Land Is Our Land: How to End the War on Private Property, by Congressman Richard Pombo and Joseph Farah, New York: St. Martin's Press, 225 pages, $22.95

Over the past couple of years, supporters of limited government and individual rights have been puzzled and disappointed by the surprising speed with which the political momentum of the property rights movement has vanished. Beginning with the publication of Richard Epstein's *Takings* in 1985, the intellectual and legal communities started reevaluating the role of the regulatory state in the American constitutional system, especially as regulations affected landowners. Epstein's argument—that regulators who denied property owners the use of their land were "taking" it, and that owners were therefore owed compensation, as in cases where the government explicitly exercised the power of eminent domain—caused state and federal courts to begin placing limits on bureaucrats and legislators. In the most noteworthy cases—*Nollan v. California Coastal Commission, Lucas v. South Carolina,* and *Dolan v. Tigard*—the U.S. Supreme Court somewhat haltingly admitted that, yes, the right to own and use property may be constitutionally protected. At the same time, grassroots property rights groups began to spring up, demanding legislative relief from the actions of overreaching elected officials and bureaucrats.

The 103rd Congress, under Democratic control, came close to enacting limited reforms that would have provided compensation for landowners when some of these "regulatory" takings occurred. And even though a stand-alone compensation bill didn't pass, that Congress was able to stop the creation of the National Biological Service, a new federal agency that would have given government employees and "volunteers" from environmental groups broad powers to trespass. As these persons attempted to inventory all the plants and animals in the territorial United States, the NBS would have let them enter private property without the consent of its owners. After the election of a Republican majority in 1994, as part of the Contract with America the House of Representatives passed a takings compensation bill by an astounding 277–141 margin.

Yet before the Senate could bring a similar takings bill to a vote, the entire Republican "revolution" fizzled. As a smaller, chastened Republican majority takes charge of the 105th Congress, takings compensation bills have disappeared from the legislative agenda. What halted the property rights juggernaut?

In part, property rights activists haven't been able to build political coalitions large enough to counteract the scare tactics environmentalists so effectively use. (See "Property Frights," May 1996.) And the property rights movement has lacked systematic, accessible defenses of its position a lay reader could appreciate. Epstein's book is important, but it is heavy reading. Meanwhile, farmers, ranchers, real-estate developers, and residential landowners can cite examples of outrageous actions by regulators (and, in some cases, by courts). But these anecdotes have for the most part been published in internal newsletters, by vanity presses (sometimes featuring dubious scholarship or conspiracy theories that would cause believers in alien abductions to shake their heads), or in such ideologically sympathetic publications as *The Wall Street Journal* editorial page, *National Review,* and REASON. Professionally written and edited book-length treatments of the contemporary property rights controversy—volumes that lay readers can find in better bookstores alongside other mass-market nonfiction works about current issues—haven't existed. Until now.

While intended for slightly different audiences, *Property Matters,* by Washington, D.C., attorney James DeLong, and *This Land Is Our Land,* by Rep. Richard Pombo (R-Calif.) and veteran conservative writer Joseph Farah, are accessible, useful primers for readers who want to know why a grassroots property rights movement has emerged and why it has assumed a warlike footing.

Pombo, a cattle rancher from the Central Valley of California, has been a lightning rod on environmental issues since he was first elected in 1992. He has sponsored revisions of the Endangered Species Act that would allow property owners to receive compensation if the discovery of threatened or endangered species on private land caused the property value to fall. Newt Gingrich also chose Pombo as the co-chairman of the House Environmental Task Force, a group of Republican legislators that vets all environmental bills before they come to the floor for a vote. (See "Natural Lite," October 1996.)

Pombo targets his book at a conservative audience, citing a biblical defense of property rights, reminding readers that the Founders explicitly protected property in the Constitution, and offering occasional (if somewhat superficial) attacks on central planning. He describes how wetlands have been transformed in the public mind and the public law from swamps that breed disease-bearing critters to altars at the environmental church. And he explores the growing "eco-federal" coalition of environmental advocacy groups, government regulatory agencies, and congressional appropriators.

By consistently portraying environmentalists as antagonists, Pombo should have no problem convincing an audience that may agree with him anyway. And by selecting as his co-author Joseph Farah,

who worked with Rush Limbaugh on his second book, *See, I Told You So*, he has found a collaborator well-suited to appeal to readers who are politically engaged but aren't policy wonks.

But there's a troubling blind spot in this book. The explosive growth in the population of the West could never have happened without the massive government water projects that were started during the New Deal. Unlike the eastern United States, where water was plentiful and land scarce, in the West land was cheap and water dear. As DeLong explains in *Property Matters*, the Homestead Act of 1866 gave away 160-acre parcels of land to anyone who would stake a claim: East of the 100th Meridian, where 40 or more inches of rain fall every year, 160 acres of farm land would easily support a family. In the rain-deprived areas west of the 100th, however, such plots were worthless—unless they were located along a river or lake. Harnessing Western rivers made large-scale agriculture possible and helped support the migration of people from the East and the South.

Much development in the early West depended on water socialism. Before World War II, the easiest way to move massive amounts of water to Western lands was to build dams or otherwise divert rivers. (The centrifugal pump, which became widely available in the late 1940s, made it possible to reliably pump ground water to the surface.) Pombo's book doesn't mention the thorny problems caused by socialized water, a curious oversight, since his Central Valley congressional district would certainly be less populous and less prosperous without it.

You'll find no such gaps in James DeLong's *Property Matters*. Rather than offering sustenance to beleaguered fellow travelers, DeLong instead tries to win over skeptics and potential opponents. The result is a book that's engaging, well-argued, and openly cognizant of the complexities of politics and the law. DeLong goes beyond the familiar areas of wetlands, endangered species, and grazing to incorporate historical preservation, zoning, and even intellectual property in his discussion.

Much development in the early West depended on socialized water. James DeLong devotes a chapter to water rights; Congressman and rancher Richard Pombo is strangely silent on the matter.

After opening with a few familiar horror stories, DeLong provides some historical background and then spells out his own principles, which are closely tied to those of John Locke. Locke explicitly rejected the feudal notion that the control of property is entrusted by God to the crown, arguing rather that property belongs to individuals. "Property does not have rights," DeLong writes. "People have rights, including the right to hold property. Efforts to draw a distinction between 'personal' rights or 'human' rights and 'property' rights produce mischief."

Yet complexities arise. Some land is held in common, owned by taxpayers and administered by the government; actions that originate on one plot of land often spill over to the property of others; and changing technologies require new interpretations of old laws. (When the bass frequencies from the subwoofers in your neighbor's Camaro cause your living room windows to rattle, is that trespassing?)

DeLong argues that while the Lockean vision can't eliminate these complexities, it can, through such mechanisms as due process and the rule of law, help individuals work them out in a manner more satisfactory than the exercise of raw political power. Before launching into an examination of the Endangered Species Act, wetlands laws, or zoning restrictions, DeLong offers a valuable chapter on political legitimacy in the Lockean tradition, which approximates the American constitutional system of limited government, individual rights, and federalism.

He also discusses the "unwritten" American constitution, a set of loosely defined principles that, when followed by elected officials and other government employees, give citizens a general feeling of trust about our public institutions. "A bedrock principle of legitimacy is that the government is not entitled to do anything at all unless its officials were chosen by the means prescribed in the Constitution, through free and open elections," he writes. "Laws must be passed in proper form by bodies duly authorized to enact them. Furthermore, these bodies must not be corrupt or overly self-interested, within reason."

Yet over the past 30 years or so, he argues, governing bodies and public officials have overstepped their written boundaries and the "unwritten Constitution." As a consequence, faith in government to exercise any authority legitimately has been undermined. The horror stories told by property rights advocates about environmental bureaucrats run amok are but a few examples of these uncontrolled exercises of power.

As regular REASON readers know, environmentalism has become a form of secular religion, with green activists claiming that environmental goals must trump all others. DeLong argues that if this vision is allowed to continue unchecked—if environmental agencies can violate the boundaries of their authority to pursue their objectives—then what's to stop regulators in other parts of government from similarly seizing power when it suits their ends?

Libertarians make this point when discussing, say, drug laws, but not so often when they talk property rights. And as government officials routinely break the rules (or refuse to enforce them) to serve their own purposes, individuals start to believe that they must use the political process—initiatives to limit taxes or terms of office, for instance—to restrain political agents. But relying on political reforms to limit government power is risky: In an election, if your side gets one vote less than 50 percent, you get nothing.

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DeLong also blames the courts for refusing to defend property rights with the same vigor as religious freedom or freedom of speech. The courts have remained on the sidelines, he says, as "property is conscripted for public use as a wildlife refuge or environmental buffer. Federal legislatures are exercising power over matters of local concern, without competence or knowledge of local conditions.... Burdens are put on one person or a few that should properly be borne by all.... Appeals and objections are decided by the same agency and even the same person who made the original decision." This judicial passivity is a principal reason many members of grassroots property rights groups decided to become political activists.

And while jurists from Oliver Wendell Holmes to Clarence Thomas have pointed out that voters can always repeal silly or arbitrary laws, DeLong says, "Voting is a very blunt instrument for preventing abuses of power that affect only limited numbers of people." A government "that wishes to maintain its legitimacy [must] set up better instruments of control over itself. Part of the current crisis of legitimacy is the courts' solemn insistence that citizens must rely on a remedy [direct democracy] that is palpably inadequate." As otherwise law-abiding individuals pursuing peaceful ends find themselves continually thwarted by bureaucrats, courts, and their fellow citizens, they're tempted to become peasants wielding pitchforks, threatening to undermine the rule of law as they seek what should be legitimate relief.

DeLong maintains his healthy skepticism of plebiscites and other political mechanisms throughout the book, making it a refreshing change from the horror-story-followed-by-outrage format so many other books about overreaching government policies seem to feature. And DeLong's chapters on water policy, the West, and zoning are full of surprising insights.

In particular, he takes a revisionist view of the Tellico Dam, a *bête noire* of most opponents of the Endangered Species Act. Tellico is a 1970s-era Tennessee Valley Authority project that was 95 percent complete when habitat for an endangered fish—the snail darter—was discovered in an area scheduled for flooding. ESA advocates demanded that the dam be left unfinished; opponents instead ridiculed the species-protection law, asking why saving a tiny fish no one had heard of before should be allowed to bring an important project to a halt.

Forget the Endangered Species Act, says DeLong: The completion of Tellico would "destroy a beautiful valley and splendid trout stream to gain a trivial increase in power generation at a nearby dam. Leaving out any environmental arguments, the dam [could] not meet any cost-benefit test." Indeed, a blue ribbon congressional panel, which had the legal authority to circumvent the ESA when the benefits of completing a project outweighed the costs of shutting it down, urged the feds to abandon the project. Yet Congress didn't follow its own expert advice, exempted Tellico from the ESA, and against all economic wisdom ordered the dam to be completed.

DeLong concludes that property rights supporters must rehabilitate the Lockean vision with the general public and with the mainstream media, or else the peasants will take up their pitchforks.

Tellico was a high-profile example, but not unique. "Because everyone was anxious to build dams," DeLong writes, "Congress was not interested in asking whether they made economic sense." By the 1960s, he notes, the federal Bureau of Reclamation "had 19,000 employees who did nothing but plan and supervise projects and look for new ones." The bureau "became a massive machine to provide expensive water at low cost." Indeed, landowners who get water from the Bureau of Reclamation receive a $2,000 subsidy for every acre under irrigation.

To the consternation of some free-marketeers, DeLong also acknowledges that some property will inevitably be held in common and that it will have to remain under political management. I've driven cross-country three times in the past eight years, and one of the many impressive things about the West is the incredible amount of uninhabited (and, from all appearances, uninhabitable) land located alongside major highways. Just spend a few hours driving I-10 in West Texas and New Mexico and ask yourself if you would want to own or manage that land, even if the feds gave it away.

Nor is DeLong a reflexive opponent of every zoning, land-use planning, and environmental regulation in urban settings. "There are some problems with them," he writes, "especially with the tendency to make them overly complicated and underly predictable, but the basics are not bad." He has little quarrel with the straightforward zoning laws of the 1920s. At that time cities were divided into districts, and within districts officials established a few categories, ranking permissible uses from highest (say, single-family residential) to lowest (industrial). "Within any district the designated use and all higher ones were permitted. If you wanted a house in the factory zone, you could have it, but you couldn't complain about the noise."

Yet beginning in the 1950s zoning became more restrictive, prohibiting such "mixed uses" as having new homes built in a commercial or industrial district. And as land-use planners started using zoning as a way to "make this a better world" rather than as a direct response to identifiable nuisances, zoning ordinances became, in DeLong's view, "tools for thievery."

DeLong concludes that property rights supporters must rehabilitate the Lockean vision with the general public and with the mainstream media, or else the peasants will take up their pitchforks. "The message must emphasize not only the importance of the right to property, but also the lack of conflict between this right and other values important in our society," he writes. "The world is full of choices and trade-offs and respect for property is the only way in which a society can let its members pursue their many diverse goals in a peaceful and efficient fashion. You should be able to call yourself an environmentalist even if you are not willing to become a thief." *Property Matters* is a valuable addition to the popular literature on political economy, with insights that go beyond today's property rights debates.

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Of Sand and Cities

By Steven Postrel

How Nature Works: The Science of Self-Organized Criticality, by Per Bak, New York: Springer-Verlag, 212 pages, $27.00

The Self-Organizing Economy, by Paul Krugman, Cambridge, Mass.: Blackwell Publishers, 122 pages, $18.95 paper

Theoretical physicists are famous—or notorious—among their scientific colleagues for certain stereotypical traits: self-confidence shading into arrogance; a passion for reducing things to their essentials; a conviction that other fields could be easily mastered if they could afford to take the time; and an unwillingness to actually learn about those fields except under extreme duress.

Per Bak, the author of *How Nature Works,* is a theoretical physicist at Brookhaven National Labs who earned his reputation working on "critical phenomena associated with equilibrium phase transitions" and organic conducting materials. Judging from this book, he is a worthy representative of his profession.

Self-confidence? Consider the book's title. A passion for simple models? Bak says, "Our strategy is to strip the problem of all the flesh until we are left with the naked backbone and no further reduction is possible." Contempt for the achievements of other fields? Bak reports his opening conversational sally on meeting famous paleontologist and PBS stud Stephen Jay Gould, co-inventor and promoter of the notion of "punctuated equilibrium," which says that evolution occurs in spurts: "Wouldn't it be nice if there were a theory of punctuated equilibria?" (To which Gould replied, "Punctuated equilibria is a theory.") Unwillingness to learn about other fields? Consider this howler: "Similarly, the emphasis in economics is on prediction of stock prices and other economic indicators, since accurate predictions allow you to make money. Not much effort has been devoted to describing economic systems in an unbiased, detached way, as one would describe, say, an ant's nest." This attitude of cocky ignorance perhaps explains the unusual absence of any promotional blurbs on the book's jacket.

That said, *How Nature Works* is a good book, and it is good, in large part, precisely because of Bak's stereotypical physicist attitudes. In print, at least, what might seem arrogant comes across as a kind of innocent, childlike enthusiasm, a lack of concern for anything but the sheer joy of figuring things out. His ruthless simplifications of geology, evolution, and neurology pay off because, as Bak notes, his models describe behavior that is common across these domains. This universality means that trampling across others' turf is not only acceptable, but almost mandatory, if the underlying principles are to be exposed. Finally, for the most part, Bak wants the reader to grasp the basic logic of his arguments; only rarely does he try to persuade with flights of poetic language or brute intellectual authority.

Scholars from different disciplines often feel a greater sense of kinship because of shared techniques than they do because of shared subject matter. (Economic theorists, for example, are much closer in style and interests to theoretical evolutionary biologists than they are to occupational sociologists.) As a result, new disciplines that apply common techniques to a wide variety of phenomena are more attractive to the adventurous scholar than those applying disparate techniques to a narrow range of phenomena.

These days, the grandest of the "I have a hammer and look! you're really working with nails" adventures is the study of "complexity." From the Santa Fe Institute to campuses all over the world, computer simulations are being run in which simple rules applied to simple elements generate complex, ordered-looking structures. For enthusiasts of spontaneous order in human affairs—those who maintain a sense of wonder at how intricate, unplanned networks manage to provide everything from drain cleaner to symphonies—the ongoing search for principles of *self-organization* carries high stakes. At the very least, the prospect that such principles might be discovered should weaken knee-jerk resistance to rigorous mathematical theorizing about social life.

Much of the early work in this area was exploratory—showing how the subtle flocking behavior of birds in flight could be mimicked by simple software rules, for example—without really developing underlying insights or models that could be confronted with data from different fields. Traditionalists could laugh about "video games" attempting to pass as science.

But now, the complexity geeks are starting to get somewhere. On one front, John Holland and his co-workers, from a math and computer science perspective, are working on tools for modeling what they call "complex adaptive systems." (See "Learning Curve," December 1996.) The other advancing front is what might be called the "statistical systems" approach. The idea here is to note certain statistical facts about the complex macroworld, posit simple processes operating among individual elements in the microworld, and then show how (and preferably why) these processes cause those statistical patterns to appear at the macro level. Stuart Kauffman, a biologist at the Santa Fe Institute, has taken this approach in his efforts to explain the origin of life and the evolution of species. (See "Who Ordered That?," February 1996.) But Bak, the senior collaborator on many of the most important papers from this perspective, is probably the central figure.

Bak's all-purpose hammer is *self-organized criticality.* A system is *critical* if it is poised to undergo structural changes, including possible major upheavals, upon being given a small push. The criticality of a system is *self-organized* if it ends up in the poised state as the result of a series of "natural" small pushes.

Bak's paradigm is the sandpile. Think of dropping individual grains of sand onto a flat surface. As the grains cumulate, they start to form a pile, which is very shallow at first. During this early period the system is not critical; each new grain of sand might dislodge a few of the grains, but that's it. As the pile grows, however, its sides become steeper, and now there is the possibility of a small domino effect, where one grain's movement downhill dislodges

others, which in turn dislodge still others.

For a while, these avalanches are not big enough or frequent enough to stop the gradual steepening of the sandpile. All the disturbances are local, and grains of sand far from an avalanche are not affected. But then, Bak says, "Eventually the slope reaches a certain value and cannot increase any further, because the amount of sand added is balanced on average by the amount of sand leaving the pile by falling off the edges....It is clear that to have this average balance between the sand added to the pile, say, in the center, and the sand leaving along the edges, there must be communication throughout the entire system. There will occasionally be avalanches that span the whole pile. This is the self-organized critical (SOC) state."

Per Bak argues that self-organized criticality, as exemplified in the sandpile model, looks like a plausible general-purpose way to understand complex systems.

Bak argues that self-organized criticality, as exemplified in the sandpile model, looks like a plausible general-purpose hammer for understanding complex systems because a wide range of them possess properties which can be derived from sandpile-type models. These properties are statistical; they do not say exactly what is going to happen next, but they do constrain the possible patterns of events that can be observed. It turns out that both the SOC sandpile and a number of other real-world systems tend to behave according to what are known as "power laws."

If the logarithm of the number of avalanches in a SOC sandpile is plotted against the logarithm of the size of the avalanches, the result is a straight line. Such a linear relationship in the logarithms is called a power law. (The name is apt because an equivalent statement is that the frequency of an avalanche of a given size is equal to that size raised to some power.) In the study of earthquakes, the line is called the Gutenberg-Richter law, and the fit of the data, judging from Bak's pictures, is remarkable. "It turns out that every time there are about 1000 earthquakes of, say, magnitude 4 on the Richter scale" he writes, "there are about 100 earthquakes of magnitude 5, 10 of magnitude 6, and so on." (The Richter scale is the logarithm of the energy released in a quake.)

Fossil data assembled by Jack Sepkoski and analyzed by David Raup show that over a 600-million-year period, the magnitude of extinction waves, as measured by the percentage of all marine species wiped out in a period, is related by a power law to the frequency of those waves. Big catastrophes, where high percentages of species disappear, don't appear to be qualitatively different from small upheavals—they just happen less frequently. This suggests that no special explanations are needed to cover the big extinction waves; even if no asteroids ever hit the earth, occasional giant extinction avalanches would still run through the ecology.

Power laws also appear in data that vary over time, such as the changing water level of the Nile. They crop up in the geometry of coastlines, mountains, and trees. And they show up in human affairs as Zipf's law, which says that the magnitude of system elements is related by a power law to the rank of their magnitude. For the populations of U.S. cities, the relationship is particularly simple: The population of a metro area is inversely proportional to its rank by population, so that a city of rank 100 (Shreveport, Louisiana, with 374,000 people in 1992) is about one-tenth the size of the 10th-largest city (Houston, with 3.96 million); the line wobbles a bit with the very largest cities, but the fit is still remarkable. Zipf's law also applies to the frequencies of word use in English and, though Bak doesn't mention it, to the numbers of papers published by scientists.

Bak uses the universality of these properties to argue that some general, underlying theory must be applicable to all the systems that display them: Self-organized criticality as seen in a sandpile must also be responsible for earthquakes, solar flares, river branching structures, urban population distributions, biological extinction waves, macroeconomic fluctuations, and a whole lot more. Universality may be proving too much, however, since it is hard to believe that word-use frequencies, for example, have anything to do with sandpiles. It is a little like saying that because IQ scores and missile impacts around a target both obey a Gaussian bell curve, they must share an underlying mechanism.

The universality argument is most persuasive when applied to physical systems that have direct analogues to the gradual energy input, dissipative friction, and chain-reaction possibilities of the sandpile. For example, earthquakes get their energy from gradual tectonic plate movement; the friction along fault lines resists movement; and when the stresses do produce sudden ruptures, the stress gets redistributed to other places. The metaphor seems like a pretty good one to me, and it appealed enough to at least three other research groups that they independently published articles titled "Earthquakes as a Self-Organized Critical Phenomenon." By 1995, there were over 100 articles published in support of the idea that earthquakes are a manifestation of SOC in the earth's crust.

When we come to Bak's efforts to model economic phenomena, however, the universality argument for his SOC hammer practically disappears. He presents no data showing power laws apply to business cycle fluctuations, which are the only phenomenon he attempts to model explicitly. His model has layers of vertically related firms mechanically ordering, delivering, and producing goods. Firms follow arbitrarily imposed fixed rules for inventory accumulation and exhaustion. The analogy to falling sand in this model is a series of orders for final goods that arrives each period. The system eventually self-orga-

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nizes to a critical state where avalanches of production of all sizes are possible, and the avalanches follow a power law.

More interesting than the details of the model are Bak's comments about the difficulty of working on it with two economist co-authors, Michael Woodford and Jose Scheinkman. Other social scientists view economists pretty much the way I described the stereotype of theoretical physicists, only without the legitimacy of the atomic bomb to back up their arrogance. Bak seems surprised to find out that economists are actually more careful about mathematical rigor than physicists, and he seems perplexed that his sweeping criticisms of economic theory, pungently expressed but embarrassingly uninformed, were not taken to heart by his economist collaborators.

Maybe he should pick up a copy of *The Self-Organizing Economy,* adapted from a set of lectures given by Paul Krugman. "For whatever reason," Krugman writes, "the authors of articles and books on complexity almost never talk to serious economists or read what serious economists write; as a result, claims about the applicability of the new ideas to economics are usually coupled with statements about how economies work (and what economists know) that seem so ill-informed as to make any economist who happens to encounter them dismiss the whole enterprise. But it does not have to be that way." (Of course, Bak did *talk* to serious economists, but one gets the impression that he didn't listen.)

Krugman is an interesting case. His work as an elite economist injected increasing returns to scale into trade theory. That helped beget the deadly mutant spawn "industrial policy," which he has since tried to kill with vigorous popular writing. He does not suffer fools gladly, and is happy to puncture the pretensions of pseudo-thinkers like Lester Thurow or William Greider.

The book at hand, however, is, like Bak's work, a piece of serious popular science writing; the author tries to be engaging and clear but is not afraid to use a little mathematics. Krugman's exuberance in describing his work helps get the reader over the rough spots. As a set of lectures aimed at people with backgrounds in economics, it also includes some technical sections that would be hard going for the uninitiated. Fortunately, these can be skipped with little loss of meaning.

In the past few years, Krugman has gotten interested in spatial economics, which has been something of a professional backwater. He was intrigued by the failure of traditional urban economic models to generate modern polycentric cities such as Los Angeles. He also wanted to explain the uncanny regularity of Zipf's law for city populations: "We are unused to seeing regularities this exact in economics—it is so exact that I find it spooky," he says, noting that the law holds for data back in 1890 about as well as it does now.

Krugman has two principles of his own for explaining self-organization. One he calls "order from instability," which he applies to the formation of Los Angeles-style "edge cities." The other he calls "order from growth," which he uses to derive Zipf's law.

The edge city model posits that firms placed on a circle or an infinite line want to be near one another, because there are likely to be more customers and suppliers available in crowded locations, but they want to be apart from each other to reduce competition for inputs and customers. Provided that neither the attractive nor the repulsive force overwhelms the other, and that the attractive force works over a shorter range than the repulsive force, it turns out that any random initial distribution of businesses, no matter how even, will self-organize into a set of regularly spaced business centers. ("Order from instability" enters this story because a too-uniform distribution of firms turns out to be unstable, leading eventually to a regular spacing of similar-sized clumps.) Krugman sometimes calls this process "urban morphogenesis," because it is similar to certain stories of how cells in a developing embryo self-organize so that wings, legs, and eyes end up in the right places. This model has undeniable intuitive appeal; it's hard to imagine a radically different story that could better explain the pattern.

The random growth model for city populations is a variation on something economist Herbert Simon proposed many years ago. It supposes that cities add population in proportion to the population they already have, with "lumps" of new population attaching to existing "clumps." To prevent the largest cities from absorbing all population growth, it is necessary to add a probability of new cities forming. With this setup, Krugman proves that the distribution of urban populations evolves to a critical state represented by Zipf's law. The model is somewhat problematic, as Krugman freely discloses in his technical discussion, because the amount of new-city founding or population growth needed to get Zipf's law looks too big to represent historical United States data. But merely having a theory that is subject to refutation, and which confronts the remarkable regularity of Zipf's law, is a big step forward.

Krugman's general approach seems more plausible than Bak's for developing a general understanding of self-organization and complexity, for two reasons. First, he is willing to suppose that there is more than one process going on in the world, as shown by his instability and growth models. It really does seem absurd to suppose that the power law for word-use frequencies in English is generated by the same kind of process that determines earthquakes. SOC, order from instability, and Simon-style growth models appear to be independent explanations for power-law regularities. Second, Krugman starts with a more grounded understanding of the phenomena he studies, so that he knows better what features of reality are lost when he simplifies things in his models.

The statistical approach to understanding complexity seems unlikely ever to develop into a separate science that cuts across the wide range of subject matter discussed in these two books. But as the techniques and models are developed in each of the fields where they show promise, there may be a historical period of unusual cross-disciplinary conversation and understanding. Encounters between different academic tribes are rarely placid; adventurers on this trail are going to need a lot of exuberance and at least a little bit of arrogance.

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Taxing Our Health

By Michael W. Lynch

Market Driven Health Care: Who Wins, Who Loses in the Transformation of America's Largest Service Industry, by Regina Herzlinger, Reading, Mass.: Addison-Wesley, 416 pages, $25.00

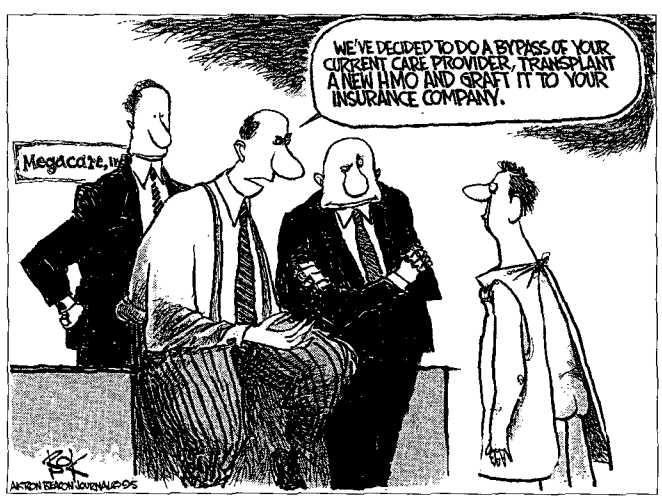
Even within the "free minds, free markets" crowd, just what constitutes a free market in health care is controversial (See "Medical Meddling," December 1996, and Letters, March 1997). Is managed care a product of the market, of government distortions of the market, or of some mixture? What would America's health care system look like if it were truly operating under a free market?

Regina Herzlinger, a chaired professor at the Harvard Business School, enters this fray with *Market Driven Health Care: Who Wins, Who Loses in the Transformation of America's Largest Service Industry.* Billed as an "indispensable guide for policy makers, practitioners, and anyone interested in the future of this vital and complex industry," Herzlinger's book provides less a road map of the rapidly changing health care market—which now includes government, indemnity insurance, various levels of managed care, and even medical savings accounts—than a vision of the way it ought to be. While her vision is compelling, she fails to do it justice.

Like a political speech, *Market Driven Health Care* too often lurches from one applause line to the next, issuing crowd pleasers such as "patients will not be patient" but shirking the responsibility of providing the tough analysis of how the world Herzlinger envisions will actually come about, given the current regulatory, legal, and political environment. In the end, she knocks the legs out from under her own argument for consumer-driven health care by calling on Congress to determine, and the IRS to enforce, how much insurance individuals purchase.

Herzlinger designed and teaches a Harvard course on creating new health care ventures. She has written on this subject for the *Harvard Business Review,* and her book is remarkably similar to a cogent article she wrote for *The Public Interest* in 1994. Her straightforward vision for the future of health care is based as much on the system that produces the McDonald's french fry as it is on the now ubiquitous eye care centers. In the future, America's health care industry will comprise a plethora of competing "focused factories," freestanding centers of excellence that deliver one product—be it complete cancer treatment, foot care, or asthma therapy—and deliver it well. Focused factories "could be established that specialize in any of the millions of high-volume procedures, such as births, cataract surgeries, and bypass operations," she writes. "Others could provide all the services required to care for the chronic diseases or conditions that account for the bulk of our health care costs, like asthma, diabetes, foot pain, and cancer."

The transformation will be spurred by "activist consumers," who are more time-sensitive than ever and demand convenience and quality. Just as time-pressed consumers forced a revolution in retailing, eschewing unwieldy department stores such as Montgomery Ward and Walgreens in favor of specialty superstores such as Staples, Home Depot, and Toys "R" Us, they will transform the health care industry from one organized around the needs of the producers to one centered on the needs of the consumers.


WE'VE DECIDED TO DO A BYPASS OF YOUR CURRENT CARE PROVIDER, TRANSPLANT A NEW HMO AND GRAFT IT TO YOUR INSURANCE COMPANY.
Megacare, Inc.
CHIP BOK

Herzlinger's new world is also one in which reliable information is abundant. Acknowledging that it is currently difficult for consumers to find out even the most basic information on the cost and quality of various health care providers, institutions, and insurers, Herzlinger describes an era in which such information is as easily available as information on cars from J. D. Power, stereos from *Consumer Reports,* and restaurants from the *Zagat Survey.*

Empowered consumers—people spending their own money—will drive these changes by deciding whether to get their foot corns removed at Sal's Sole Repair or Al's Ankles & Feet, two of the hundreds of focused factories excelling in the treatment of toes. "When consumers pay directly for health care, the services they receive are economical and convenient," Herzlinger writes.

True enough. But herein lies the crippling defect of Herzlinger's book: She never adequately explains how we move to a system in which the consumer spends his own money, rather than that of his employer or government, when he shows up at a hospital or focused factory.

She does a good job of describing—with both anecdotes and statistics—what is wrong with the current system. It is inconvenient because "most of the health care system is organized around the needs of its providers, doctors, and hospitals, not around the needs of consumers." And she nails the reason—Americans don't purchase their own health care. "When people pay for their health care services directly from their own pocket those services are invariably convenient and helpful information is readily available. When people pay only partly out of their own pockets, as is common in the United States, the services are inconvenient and consumer-oriented information is largely unavailable." But she fails to adequately explain how the system will evolve so that individuals pay for a larger proportion of their health care.

It's not that Herzlinger doesn't recognize serious barriers to the development of her

consumer-driven focused-factory health delivery environment, it is that she doesn't pay these barriers the attention they deserve. Herzlinger places barriers in three categories: insufficient demand due to a third-party-payer system; insurers wanting to control cost more than provide convenience; and regulatory barriers.

Consider those pesky regulatory barriers. "Licensing requirements needlessly restrict managers' ability to select appropriate personnel, while various legal roadblocks against the union of medical and business skills are in place," readers are told. Herzlinger cites restrictions on the ability of physician assistants to prescribe medicine as one such example, and the list could certainly be longer. But after identifying this problem, she is content to slip back into the warm fuzzies of "everything will work itself out" rhetoric.

Her solution to this classic concentrated-benefit and diffuse-cost situation is that "Americans want convenience from their health care system" and "ultimately the public will get its way; as it should." In her defense, her writings—this book included—are part of a necessary campaign to educate policy makers and consumers on the diffuse cost barriers. Still, as with many other areas this book touches on, the informed reader will wish that she treated this issue with greater depth.

Herzlinger's whole vision rests on the premise that individuals, not government or employers, will someday pay for a significant amount of their own health care. It is unfortunate that she waits until the second to last chapter of her book to address this fundamental issue.

Health insurance is employment-based for a majority of privately insured Americans, as most REASON readers know, because it is tax-free compensation. As a result, there is an incentive to buy more health insurance (or health *care*) with those pre-tax dollars than employees would purchase if—like food, clothing, housing, or entertainment—the cost were coming from their net incomes. The tendency, then, is for the employer to purchase not just catastrophic insurance à la homeowner's or auto insurance but routine maintenance and first-dollar coverage. There are two ways to correct this distortion: let individuals buy their own health care with pre-tax dollars (as in medical savings accounts) or make health benefits taxable compensation.

Herzlinger chooses the former, advocating either tax-deductibility for individual health purchases or a version of medical savings accounts, which combine high-deductible indemnity insurance with a medical IRA from which an individual could pay for routine health care with pre-tax dollars. In a world replete with high taxes and targeted tax breaks, either of these options is preferable to the existing system, and both would do much to develop a consumer-driven market in health care. But Herzlinger, like many technocratically inclined experts, isn't satisfied with letting consumers spend their own money on health care and decide which insurance policy to purchase. She wants the government to dictate to individuals how much insurance they must buy.

Advocates of medical savings accounts are sure to burst a blood vessel in their foreheads if they make it to Herzlinger's penultimate chapter, "A Consumer Controlled Health Care System." Basing her argument on an implicitly developed theory of adverse selection, Herzlinger argues that "a government mandate that requires the purchase of health insurance is essential to the existence of affordable health insurance policies."

Continuing along this line of reasoning, she states that otherwise "many young people may choose a policy that covers them only in the unlikely event that they are accidentally injured or contract an infectious disease such as hepatitis," as if young people, or anyone else, would buy insurance for any other reason. (Imagine a Harvard Business School professor complaining that individuals would only buy fire insurance that covers them in the unlikely event that their house burns down!) In Herzlinger's world, if young people aren't forced to buy products they neither want nor need, then "other people will not be able to find affordable health insurance." To prevent such a catastrophe, she calls for the government to require individuals to buy a "specific kind of policy."

Herzlinger goes much further than requiring that individuals buy some insurance, so as not to be a burden to society in the event that they unexpectedly contract a disease or become incapacitated, which is a boilerplate public goods argument. She wants specific insurance policies. So much for her consumer-driven market.

It gets worse. Readers are informed that "the purpose of insurance is to protect people from financial ruin," which means that the government should require individuals to buy certain health insurance policies based on their income. "People who earn $50,000 a year probably could afford to pay about $500 out of pocket for health care, while those who earn $200,000 realistically could pay a much higher amount." While this may be true, it should be a non-issue. Who is Herzlinger—or any other academic, politician, or bureaucrat for that matter—to tell individuals how much health care they can afford?

The effect of her scheme, although she never recognizes it, perhaps because she may be in the $200,000-a-year neighborhood, would be to further price people of modest means out of the health market. Since premiums are inversely related to deductibles, in Herzlinger's world, those of us toiling for less than six figures, many of whom are healthy and young, would be forced to pay more for health insurance so that individuals who are older and worse insurance risks—but who earn more money—could spend less.

Here Herzlinger also conflates current income with wealth or resources. Young adults often enjoy a financial safety net—provided not by the government but by their families. As many middle- and upper-middle-class college graduates know, parents will often buy high-deductible indemnity plans for their children who are too old for the family policy but not yet covered by their own employer-provided insurance. It may be the case that the young adult couldn't afford the $3,000 in health expenses before the policy kicks in, but many parents can.

In the end, the only rationale Herzlinger leaves herself for requiring young, healthy adults to buy more insurance than they otherwise choose is the cross-subsidy it provides older individuals in the insurance market. Readers can form their own opinion as to whether this justifies a federal mandate on individual insurance purchases. And who would enforce her minimum requirement? "The IRS would require taxpayers to demonstrate that they

have purchased a health insurance policy that covers all the health care expenses that they could not afford to pay personally," she writes.

From here, the arguments start to contradict themselves, and it becomes clear why Herzlinger left the most important, and substantive, chapter for last. On page 259, she tells us that "clearly the mandatory policy should cover costly long-term care expenses and even preventive health care, for those who cannot afford to pay for them directly" (as if they can then afford to pay for them indirectly through insurance premiums). But on the very next page, she tells us that her "consumer-controlled approach" (which by now is really an IRS-controlled approach) relies on the freedom of individuals to purchase the package of benefits that they want. "Limits that are placed on Americans' ability to shop for health care will seriously compromise their ability to make the health care system more efficient," she says.

REASON readers will appreciate certain aspects of the book. Herzlinger makes the case, mostly by indirect example, that health care, like life's other necessities of housing, clothing, food, and a decent beer, should be provided for a profit. She usefully quantifies the opportunity cost of waiting for health care, which she places at $3.5 billion a year just for physician visits and $2.5 billion for undertreated depression. Many health analysts, especially those enamored with government-funded or -provided health care, tend to ignore these costs because they don't show up on the accounting ledger. Herzlinger also does a good job of compiling examples of entrepreneurial innovations in health care, such as a chain of cancer treatment centers, the eye care centers, and home health systems, all of which allow individuals to better manage their own health.

But in the end, these kernels of truth are simply not worth the effort. Serious health analysts and the casual consumer alike will be better served by reading Herzlinger's more precise 18-page *Public Interest* article. She simply didn't add enough muscle to the bones of this skeleton, to use a Herzlinger-like analogy, to stretch it into a 400-plus-page book. ◆

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Peace Corpse

By Nick Gillespie

Making Peace with the 60s, by David Burner, Princeton, N.J.: Princeton University Press, 295 pages, $29.95

As someone who came of age in a post-Beatles, post-Vietnam, post-Watergate America, I initially bristled at the very title of David Burner's *Making Peace with the 60s.* Growing up in the 1970s meant living through a "national malaise" spread by any number of downer contagions: stagflation and oil shocks; openly evil or incompetent presidents and legislators; brief stabs at wage and price controls and "double" daylight saving time; the threat of imminent nuclear war and, widely held to be even more sinister, nuclear power; booming divorce and crime rates; the possibility of Skylab crashing through the roof at the worst possible moment; the moral equivalent of war *against setting thermostats above freezing;* migrating killer bees and the occasional killer rabbit; and so much more.

As if such mini-apocalypses weren't enough, there was another annoyance aimed specifically at us kids: constant, invidious comparisons to the '60s generation *by* the '60s generation. They were idealistic, we were cynical. They were active, we were apathetic. They smoked dope and had sex to open their minds, we merely indulged ourselves. "You kids today, you don't do anything, you don't know where it's at," regularly ranted one of my high school history teachers, a bearded ex-hippie whose high point in life was hitchhiking to Woodstock. (His low point, I assumed then and hope for his sake now, was teaching at my high school.) "We were out in the streets, man, out in the streets!" he would say, exhorting us to some vague notion of revolution while demanding we raise our hands before speaking in class.

To be sure, Burner's book includes echoes of such invective—at one point he decries the "fad of self-cultivation...that followed the sixties"; at another, he bitterly writes off the '80s as "lost American years" focused solely on "consumption." Such comments are unsurprising, given that Burner, a historian at the State University of New York at Stony Brook, is both a veteran of the '60s (he was born in 1937—making him typical of the pre-baby boomers who actually led the supposedly generational movement) and an unapologetic "social democrat."

But *Making Peace with the 60s* is no valentine to its subject. It is more like a post-mortem inquiry on an accident victim. One can almost see Burner, as the pathologist, probing the corpse, shaking his head, and muttering, "It didn't have to be this way." Given Burner's politics, *Making Peace with the 60s* is perhaps even more damning than the relentless *Destructive Generation: Second Thoughts on the '60s,* by leftists-turned-rightists Peter Collier and David Horowitz. While Burner ultimately offers very little peace, he does tease out some interesting insights regarding the apocalyptic trajectory of the 1960s. Chief among these is an acknowledgment that when it comes to public policy and political processes, there is often an unbridgeable gulf between intended consequences and actual results.

For Burner, "the history of the 1960s is the history of the breaking apart of the liberal mentality," particularly with reference to the two intersecting mass actions of the decade, the civil rights and anti-war movements. To understand that breakup, Burner "examines forces of the era that might have been allies but succeeded in becoming enemies: a civil rights movement that severed into integrationist and black-separatist; a social left and a mainline liberalism that lost a common vocabulary even for arguing with each other; an anti-war activism that divided between advocates of peace and advocates of totalitarian Hanoi."

Burner's strength is his unflinching

willingness to draw the continuities in such developments, even as it pains him to do so. Where more reverential histories try to parse out the bad from the good, Burner shows how the two were intimately, if not always necessarily, related. With considerable success, he charts how a civil rights movement stressing the content of character melded into the radical chic of black separatism and armed insurrection and how liberals prosecuted a "progressive" war on poverty at home while simultaneously waging a "reactionary" war in Vietnam.

With the civil rights movement, Burner charts a fairly linear descent from moral high ground to the swamp of identity politics. The civil rights movement of the 1950s and early '60s "was about as close to moral perfection as American political action has ever come," he writes, stressing that its authority stemmed from its adherence to nonviolent civil disobedience, "a practice especially equipped for defying racial barriers and inviting even the most virulently racist enemy to recognize their wrongness and obsolescence."

However, once that movement gained its initial goals—"a meal at a lunch counter, a seat on a bus, a swim at a pool, the use of a book in a library, a ballot in a voting booth"—black power, with its emphasis on identity politics, replaced it. Borrowing a term from Lillian Smith's 1949 anti-racist novel, Burner fingers individuals and groups such as Malcolm X and the Black Panthers as "killers of the dream." He bemoans the "vigilantism following the decline of the nonviolent phase of the civil rights movement" for a number of reasons, especially for its "narcissistic absorption in the group content of self-identity."

The shift in the movement was palpable and swift. For instance, the Congress of Racial Equality, which had helped organize the integrationist Freedom Rides in the early '60s had by mid-decade become resolutely separatist. At the group's 1966 convention, leader Floyd McKissick dismissed nonviolence as a "dying philosophy" that had "outlived its usefulness." A year later, Burner writes, McKissick's successor, Roy Innis, would unveil plans for "organizing two separate and distinct races of people" by "sealing the borders" around black ghettoes. "We shall overcome" rapidly transmogrified into "Up against the wall mother fucker!"

This chronology, of course, is well known. What Burner brings to the material (besides considerable anger) is a keen appreciation for how separatism grew out of the integrationist civil rights movement. By the mid-'60s, civil rights activists turned their energy to problems beyond matters of formal, legal integration. Writes Burner: "Their tactics and concerns of necessity began to take on a black separatist cast: community organizing, improvement of neighborhood schools and of slum housing. The most immediately gratifying way to attack poverty was to nourish the economy, the schooling, the neighborhood pride, the political awareness of black communities." In a very real sense, the successes of Martin Luther King helped clear the path for radicals who would deride him as "de Lawd" and "Martin Luther Queen."

Making Peace with the 60s is like a post-mortem inquiry on an accident victim. One can almost see Burner, as the pathologist, probing the corpse, shaking his head, and muttering, "It didn't have to be this way."

Interestingly, Burner lays much of the blame for the rise of black power at the feet of white liberals. Comparing middle-class radicals in the '60s to their counterparts in the 1930s, Burner writes, "never did middle-class radicals of the earlier period prostrate themselves before representatives of the working classes in the way some white leftists of the 1960s would do before black claimants to revolution." Echoing Tom Wolfe in *Radical Chic & Mau-Mauing the Flak Catchers*, he writes, "to the extent that some American liberals patronized separatist black militancy or in its presence became guilt-locked in silence, liberalism became complicit in its own political decline."

While Burner's analysis has a good deal of explanatory power, it begs the question of *why* liberals came to "define the oppressed as agents and bearers of truth beyond the comprehension of established society." In a discussion of the influence of Jack Kerouac, Allen Ginsberg, and other Beat writers on '60s culture, Burner himself suggests a reason. Beat writings, notes Burner rightly, celebrate "rootlessness, rebellion, [and] great gobs of primal undigested experience....The rebellion...was against what the authors took to be the timorousness of the nation's culture, the narrow limits it placed upon experiencing." In this respect they anticipated many aspects of '60s culture. (Burner also stresses that the Beats were hardly all proto–left-wingers, or even liberals. Kerouac famously hated hippies, supported American efforts in Vietnam, and admired *National Review*. William Burroughs, whom Burner correctly notes "could be something of a reactionary," had more in common with the John Birch Society than Students for a Democratic Society.)

The Beats, drawing heavily on existentialism, Romanticism, and other trains of thought that celebrated authenticity, "sought, and stored reflectively in their writings, experience gained in encounters." The legitimacy they gave to "primal undigested experience," along with their starkly primitivist conception of blacks and black culture, certainly helped set the stage for the liberal racial dynamic Burner describes. Indeed, Kerouac even lauded blacks, Mexicans, and American Indians as the "fellaheen"—earthy, sexual, unrepressed peoples closer to nature than whites.

Like his discussion of the civil rights movement, Burner's assessment of Lyndon Johnson's War on Poverty is unadorned. Although as a left-liberal he supports the idea of government redistributing wealth, Burner unflinchingly catalogs the failures of the programs associated with the effort. The result could almost be a set of talking points for Newt Gingrich: Many federally funded community action programs, Burner writes, "fell under the domination of self-serving hustlers"; the Job Corps "showed disappointing results"; Head Start's "larger efficacy" is questionable; the Elementary and Secondary Education Act of 1965, designed to boost spending on poor schools, "was not a

notable success"; "only about 13 percent of homeowners and 43 percent of renters benefitting from [the Housing Act of 1968] were among the poor" as originally defined. Burner is reduced to identifying Medicare as "the most effective of Great Society programs," even while admitting that it (and Medicaid) "assured that medical costs, already rising, would sharply accelerate." While granting that an "indeterminate number of Americans" made it out of poverty due to Johnson's programs, Burner nonetheless writes that the "liberal attack on poverty...failed in practice."

As in the civil rights movement, liberals found themselves outflanked to their left: "From the New Left came an attack on the liberal welfare state that made conservative objections sound like quibbles," writes Burner, reconstructing the argument. "Especially in the angriest days of Vietnam, many radicals were unwilling to believe any good of the government....The welfare state, as its enemies on the left saw it, was a form of pacification, imperialism at home at a time of imperialist venture in Southeast Asia. A welfare check, in effect, equates to economic aid for a Vietnamese village; a housing project, to a fortified hamlet; city police, to the marines." Compounding this point of view was what Burner calls the New Left's "special perception" of the poor as ennobled by their poverty. "To say that poverty was being romanticized here by Americans who could afford to romanticize it is to say the obvious," writes Burner.

While there is no doubt that elements of the counterculture romanticized the poor (one reason for the popularity of blue jeans), Burner is not particularly convincing that left-wing opposition to welfare played a major role in subverting the Great Society or the War on Poverty. Thirty years and billions of dollars later, many of the entitlements born of that era are still with us in one form or another; and, as Burner himself documents, most of the programs had flaws inherent in their design and implementation.

Burner suggests similar inherent problems with America's Vietnam policy. "Basic to an understanding of how and why a liberal administration moved the country to full engagement in Vietnam," he writes, "is the ingrained liberal habit of combining action and restraint that allowed neither retreat nor decisive engagement. To retreat would have meant abandoning the logic of the Cold War that had been at the very core of liberal internationalism, while to advance too quickly would have signified abandoning liberal prudence."

Burner provocatively links "liberal internationalism" to "liberalism at home." Both, he suggests, were applications of a technocratic approach to governing, which fell prey to the lack of local knowledge inherent in a top-down structure. "Liberals," he writes, "were...trapped within their own belief in expertise. In [Vietnam] the technical and military experts would surely find a way to reshape South Vietnam and defeat the communists."

That of course did not happen, in part because the government was never able to generate the sort of mass support necessary to prosecute the war. Even as the Johnson administration tried to cast the conflict in Cold War terms that stressed a monolithic, international communist menace that must be met at every turn, "relatively open access" to combat zones and hospitals for journalists, granted in part due to liberal convictions about freedom of the press, denied the government any monopoly on interpretation.

By 1968, Burner notes, about 700 correspondents were reporting on the war, "and many were finding plenty of stories unfavorable to the United States." Faced on the home front with a continually surging anti-war movement, the Johnson administration found itself on the horns of a similar dilemma: "Liberals had customarily defended the right of principled dissent, even when they did not approve the cause. Now that dissent had turned against the liberals' war."

For the most part, Burner is willing and able to recognize the ironies—many of them bitter for him—of such turnabouts. At times, however, he fails to recognize the larger implications of his analysis. For instance, in a discussion of German émigré scholar Herbert Marcuse, then "the country's most visible left academician," Burner explores the reason for the extreme cast of much '60s thought and the growing distance between young radicals and the rest of America. Radicals, under the sway of Marcuse's "revolutionary dialectic of history," were not just disrupting the status quo as a means to an end (as the early civil rights movement had been). Rather, the radicals were interested in "revolution" as an ongoing process through which consciousness constantly rethought and remade the world.

"Marcuse," summarizes Burner, "contended that capitalism had succeeded in destroying among the people in general the very ability to think and act dialectically. It had done so, the argument suggests, by buying off the working class with a superficial prosperity that masked the meaninglessness of life...and rendered the population incapable of serious thought. It was therefore necessary for intellectually advanced revolutionary movements to take over the job of thinking."

In outlining such an argument, Burner indicates why dissent within and among groups could increasingly no longer be tolerated: Within such a framework, there is ultimately only one truth, only one righteous path. Those who disagree are at a lower level of understanding and must be educated upward.

Although Burner implies this is a radical rupture from mainstream liberalism, it actually replicates many of the worst elements of the modern, technocratic state—relying heavily on elite leadership and top-down control. The distance between the radicals and a rapidly expanding federal government that dictated policy in more and more areas of daily life may not have been as great as appeared at the time.

Burner's own left-liberalism allows for—perhaps creates—such blind spots. Throughout *Making Peace with the 60s*, he draws no distinction between public and private spheres and consistently conflates government action with society as a whole. In an epilogue, he romanticizes the New Deal as a time of national purpose, "a sense of a wider community," and laments the lack of such national coherence now. While such tics are bothersome, they make the book all the more convincing. Even as Burner laments the demise of big government liberalism, *Making Peace with the 60s* painstakingly details where and why things went wrong.

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Deficit Attention Disorder

Its opponents make the case for the Balanced Budget Amendment.

By Thomas W. Hazlett

So rich is the nonsense oozing from America's public forum on the Balanced Budget Amendment that you're gonna need some beta blockers if you've been paying any attention whatsoever. All the hucksterism lining up against the measure powerfully recommends it, of course. While it's difficult to see how the BBA could constrain these resourceful spenders and taxers, the public flogging of the proposal has restored my faith.

The BBA is not perfectly crafted, nor will it miraculously "fix" the federal government's compulsive gorging, nor will the court battles over what constitutes "balance" be less than hideous. Yet the champions of government, both liberal and conservative, are howling. I like that in a constitutional law.

Start with this: The system is hemorrhaging red. In fiscal 1996 the federal government spent $344 billion on interest servicing the national debt, 24 percent of total federal taxes paid! Federal budgets have been in deficit for 29 straight years. If the BBA erects but a speed bump on the federal government's joyride to fiscal damnation, then let the constitutional games begin.

The liberals crow that we need deficits to stimulate the economy in times of recession. Nice try with the mouth-to-mouth on Keynesian demand management. But since the "stagflation" of the 1970s (when fiscal policy and monetary expansionism cleverly combined to deliver negative growth effects), John Maynard Keynes has been as dead as Elvis.

On the other hand, conservative critics such as Robert Bork and Charles Fried detest the Supremes so much (perhaps because they ain't one?) that any court-enforced constraint on the duly elected branch of government is branded a tyrannical usurpation of the people's power. That's what a constitution is all about: checking democracy. The central question is, Can legislators act responsibly without a balanced budget requirement? One need not even serve up the appalling Sen. Bob Torricelli (D-N.J.), a hustler whose multimillion-dollar campaign—fully endorsed by his predecessor Bill Bradley, the Mother Teresa of American politics—had scarcely dimmed its TV spots touting his unwavering support for the BBA before he rose to cast the deciding ballot defeating it. The answers supplied by Our President are the ones dancing on the cutting edge.

The administration's argument is that we don't *need* a BBA: Let's just roll up our sleeves and get it done. "Balancing the budget only requires Congress's vote and my signature," Clinton hammers. "It does not require [us] to rewrite our Constitution."

Tough talk, Mr. President. Brrrrrrrr. Funny how you have never once rolled up your sleeves and actually submitted a balanced budget to Congress. Nor will you. Even assuming that the Clinton budget really does balance in the year 2002 (a projection the Congressional Budget Office expects to be $80 billion wrong), there is a scandalous element to this claim: The fiscal year 2002 budget is the first budget to be enacted *after* his term expires. Mr. Clinton may talk like Clint Eastwood now, but he plans to tiptoe out of town like Marcel Marceau.

Moreover, the Clinton budget is stuffed with more gimmicks than a Bourbon Street transvestite revue. In general, the deficit is projected to be higher in 1999 than in 1996, and the CBO estimates that 98 percent of spending cuts will occur only in the five-year plan's final two years.

In particular, take the license auctions conducted by the Federal Communications Commission. The administration's budget claims that we will sell 1,500 FCC licenses in 2002. One tiny problem is that the "buyers" won't get to use them until several years later, when TV stations stop broadcasting on them. You see, it's an *advance* auction sale: 2005 is the earliest 2002 buyers will take over assigned airspace, even if everything goes according to the administration's plan for transition to High Definition TV.

So far, nothing in the 10-year history of this regulatory Vietnam has gone according to plan, and no one in the industry seriously believes that TV licenses will be coughed up in 2005. But the $14.8 billion penciled in for the 2002 auction accounts for over one-fourth of that year's $53 billion in deficit reduction. Sold!

That brings us to the bizarre opposition launched by Nixon's chief economist Herb Stein. Writing in *The Wall Street Journal*, Stein notes that the BBA would hem in the policy makers, taking away flexibility. (Yes, that is the idea.) Stein actually complains that balancing the books by 2002 is a tawdry goal because right now the budget should be in *surplus*, paying off the $5.4 trillion national debt.

So Stein puts it straight to the president: Please show BBA advocates that a surplus can be achieved right away, without all the fuss and muss associated with printing new, updated copies of the U.S. Constitution. Such an example would allow BBA opponents to "feel more confident in arguing that government, without constitutional constraints, is capable of making the hard choices that adherence to a policy will require."

The Clinton budget, instead, complete with phantom revenues from nonexistent asset sales, plans to "balance" the very first year Clinton is out of office. I think, Dr. Stein, that Mr. Clinton has shown us all the "hard choices" he's willing to make. The choice before the rest of us is how hard we're willing to make it on politicians who tell us that fiscal responsibility is easy—leave it to the next guy.

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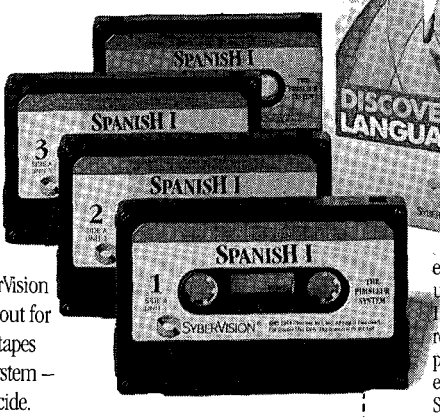

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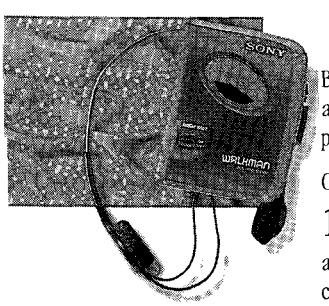

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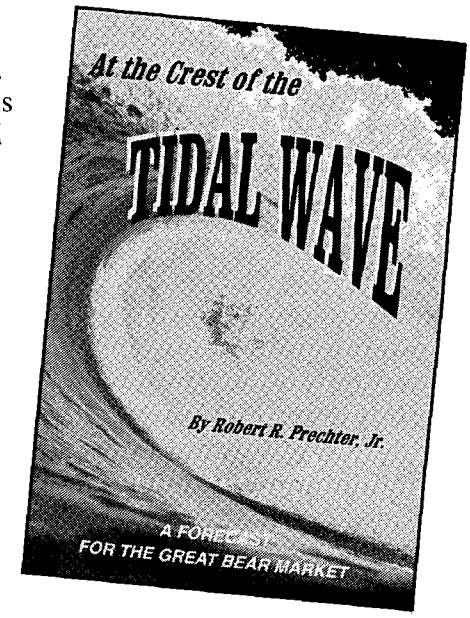

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